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No.

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In the Supreme Court of the United States

October Term, 1987

WILLIAM COPLEY, *et al.*,
Petitioners,

vs.

HEIL-QUAKER CORP., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

JAMES T. MURRAY, *Counsel of Record*
MURRAY & MURRAY CO., L.P.A.
300 Central Avenue
Sandusky, Ohio 44870
Telephone: (419) 627-9700
Attorneys for Petitioners

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTIONS PRESENTED

1. Does Section 23 of the Consumer Product Safety Act, 15 U.S.C. Section 2072, provide a private right of action for a willful violation of the substantial hazard reporting regulations issued by the Consumer Product Safety Commission at 16 C.F.R. Part 1115?

2. Is a manufacturer summarily entitled to the benefits of the statute of limitations where:

(a) it is admitted that the manufacturer had specific knowledge that a self-concealing defect in a product created a substantial product hazard;

(b) it is admitted that the manufacturer ignored its affirmative duty to report the defect to the CPSC;

(c) it is admitted that the manufacturer engaged in fraudulent acts over a 15-year period designed to conceal the defect from the CPSC, litigants, the public and others;

(d) the litigants seriously injured by the self-concealing defect offer credible evidence that the manufacturer's fraudulent conduct frustrated their efforts to ascertain whether the injuries sustained were the result of actionable conduct?

PARTIES

Present Petitioners are: William Copley, Patsy Copley, his wife, and Dale Copley, their son. All were parties in all actions below.

Present Respondents are Heil-Quaker Corporation, Honeywell, Inc., Sears, Roebuck & Company, Frey & Sons and Phillips Bottled Gas Company.

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OPINIONS BELOW

The unpublished opinion of the Court of Appeals for the Sixth Circuit is *William Copley, et al. v. Heil-Quaker Corp., et al.*, Case No. 86-3360 (6th Cir. May 20, 1987). It is found in the appendix to this case.

The opinion of the Federal District Court for the Northern District of Ohio is also unpublished. It is *William Copley, et al. v. Heil-Quaker Corp., et al.*, Case No. C82-512 (N.D. Oh. March 25, 1986). That opinion will also be found in the appendix to this case.

JURISDICTION

Petitioner invokes the jurisdiction of this Court to review the decision of the Court of Appeals for the Sixth Circuit under 28 U.S.C. Section 1254(1) **and Supreme Court Rule 17.1(a)**. Jurisdiction of the Federal District Court was invoked because of diversity of citizenship and under 15 U.S.C. Section 2072 which allows suits in any District Court of the United States.

STATUTES AND RULES INVOLVED

The Consumer Product Safety Act (CPSA), at 15 U.S.C. Section 2072 specifies, in relevant part:

> "(a) Any person who shall sustain injury by reason of any knowing (including willful) violation of a Consumer Product Safety Rule, or *any other rule or order issued by the Commission*, may sue any person who knowingly (including willfully) violated any such rule or order in any district court of the United States.
>
> • • • • •
>
> (c) The remedies provided for in this section shall be *in addition to and not in lieu of* any other remedies provided by common law or under federal or state law." 15 U.S.C. Section 2072 (1982) (emphasis added)

The 1974 text of the Code of Federal Regulations provides, in relevant part:

> 1115.2 Purpose.
>
> The purpose of this Part 1115 is to enable the Commission to evaluate notifications to determine if a

reported product which could create a substantial product hazard does, in the Commission's opinion, create a substantial product hazard and to determine the adequacy of a substantial product hazard notification.

1115.4 General Requirements.

Every manufacturer of a consumer product distributed in commerce . . . shall immediately inform the Director, Bureau of Compliance, Consumer Product Safety Commission, Washington, D.C. . . . of any defect or failure to comply immediately upon obtaining information . . . which reasonably supports the conclusion that a product contains a defect which creates or could create a substantial product hazard.

1115.5 Initial notification.

The initial notification to the Commission shall:

• • • • •

(e) Furnish (to the extent such information is then reasonably available) the data specified in section 1115.7(a).

• • • • •

1115.7 Subsequent notification.

(a) Subsequent notification to the Commission shall be made in writing and shall include, but not be limited to, the information listed below in this paragraph (a). The person(s) responsible for supplying such information is (are) placed in parentheses after each item information requested. For the purposes of this Part 1115 and in accordance with the Act, "manufacturer" includes any importer of consumer products.

• • • • •

(3) Nature of the potential hazard (manufacturer, distributor, retailer).

(4) *Date upon which information was obtained which reasonably supported the conclusion that a potential product hazard existed* (manufacturer, distributor, retailer).

(5) *Manner in which information was obtained* supporting the existence of a potential product hazard, *such as consumer complaint,* quality control testing, etc. If consumer complaints are involved, copies of such complaints should be forwarded to the Commission. (Manufacturer, distributor, retailer).

(6) Nature of the potential injury associated with the potential product hazard (manufacturer, distributor, retailer).

(7) *Whether injuries have occurred associated with the hazard or potential product hazard.* Include the number, nature, and severity of such injuries. (Manufacturer, distributor, retailer, to the extent known to each)."[1] Substantial Product Hazard Notifications, 39 Fed. Reg. 6061 (1974) (to be codified at 16 C.F.R. Section 1115)

The Consumer Product Safety Act defines "substantial product hazards" in the following manner.

Section 2064. Substantial product hazards

(a) For purposes of this section, the term "substantial product hazard" means—

---

1. These relevant portions were cited, and emphasis added, by the Federal District Court for the District of Maryland, in *Butcher v. Robertshaw Constrols Co.,* 550 F. Supp. 692 at 697-98 (D. Md. 1981). The determination of relevance of the portions of the C.F.R. cited was made by the court not by Petitioners. The only exception to this is that Petitioners have also included Section 1115.2 in its entirety.

(1) a failure to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public, or

(2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public. 15 U.S.C. Section 2064 (1982)

This Court has advanced the following consideration governing review on certiorari:

Rule 17

CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) *When a federal court of appeals* has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or *has decided a federal question in a way in conflict with a state court of last resort;* or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. Sup. Ct. R. 17.1(a) (emphasis added)

STATEMENT OF FACTS

The facts are not in dispute. In 1975, William Copley[2] was severely injured when his residential furnace exploded.

Because of the initial burns themselves and some 50 skin grafts that were taken to repair the injured surfaces of his body, the only natural skin left on Bill's body is the skin on the bottom of his feet. More than four years convalescence followed the explosion. It was during this period and in these circumstances that the Copleys attempted to ascertain whether the explosion was the result of someone's fault.

Because of Bill's incapacitating injuries, Patsy undertook the effort to ascertain if the explosion was the result of any failure on the part of another person. In addition to other inquiries, Patsy sought the help of a local plumbing and heating contractor, William Bloom, for an explanation of the explosion.

The possibility of a mechanical failure of the furnace valve as well as other potential mechanical and non-mechanical failures were obvious areas of inquiry undertaken by William Bloom. William Bloom testified in great detail about extensive efforts he made and the fact that these efforts failed to produce any suggestion of fault on the part of Honeywell or any other person. William Bloom testified that:

---

2. For the sake of simplicity, plaintiff, William Copley, shall hereinafter be referred to as "Bill"; plaintiff, Patsy Copley, shall hereinafter be referred to as "Patsy"; and plaintiff, Dale Copley, shall hereinafter be referred to as "Dale". When referred to jointly, the plaintiffs will be referred to simply as "the Copleys" and/or as "Petitioners".

1. He ". . . did not ascertain what if anything it was about the valve that played a role in the gas leakage . . . ." and that he ". . . observed nothing about the valve that would have suggested what . . . caused the gas leakage" and that his "visual inspection did not suggest what if anything there was about the valve that would cause it to fail for a mechanical or design reason."

2. He had checked with numerous sources that he knew to be reliable to determine if the valve had failed because of a mechanical or a design reason.

3. In all his years in the plumbing business, he was not familiar with the type of mechanical problem unearthed by the Consumer Product Safety Commission in 1982 and, therefore, he ". . . never would have thought to examine the valve for that particular failure."

In 1982, as a result of the Consumer Product Safety Commission's (CPSC) actions, persons in the heating and plumbing trade, for the first time, were made aware of a specific problem with the valve that serviced the Copleys' furnace. In 1982, the CPSC sought and obtained an order requiring public notice of the defect and a recall of the defective valves. Because of the egregious nature of the concealment, the CPSC also sought and obtained the largest quasi-criminal penalty assessed since the inception of the CPSC.

The critical safety-related problem revealed by the CPSC's action is now commonly known as the "stick down" problem. A detailed description of this problem is obviated by the requirements of conciseness. What is significant is the fact that it is a problem that is very diffi-

cult to discover prior to or after an explosion. Discovering the fact that the cause of the Copley explosion was the "stick down" problem was particularly unlikely because Bill had turned the knob to the "off" position prior to the explosion. As explained by one of Petitioners' experts:

> "[T]he 'stick down' problem is a subtle and not readily ascertainable problem, particularly if the knob is not found in the stuck down position. If the knob was in the off position following the explosion, neither the knob nor the valve would give any indication of what had happened. Only a person or persons who already knew about the 'stick down' problem or a person with an unusual background regarding this particular valve or these type of gas appliances would be able to reconstruct what happened."

The 1982 CPSC action against Honeywell revealed a pervasive history of affirmative acts undertaken to conceal the "stick down" problem.

Conciseness permits only one example. In 1974, a federal court found Honeywell's responses to discovery evasive. The court issued a specific discovery order requiring Honeywell to search its records and advise the court if Honeywell had received any notices or had been named in any other lawsuits alleging a defect in the subject valves. In response to this federal court order, Honeywell responded that there were no such records. When the CPSC instituted its proceedings against Honeywell, it unearthed documents that revealed that: (1) there was an adjudication in 1970 culminating with a specific finding that the "stick down" problem caused an explosion; (2) numerous internal engineering documents not only identifying the specific problem but characterizing it as

"extremely hazardous"; and (3) copious records of other claims. The Copleys documented that Honeywell had engaged in this type of fraud on the judiciary and litigants for many years before and after the explosion in their home and before and after promulgation of 16 C.F.R. Section 1115.

Immediately upon discovery of the "stick down" problem and its connection with their injuries, the Copleys commenced their common law action as well as their claim to recovery under 15 U.S.C. Section 2072. The common law action was commenced nine (9) months after the expiration of the applicable statute of limitations. When confronted in the Copley litigation with copious documentation of its 15 years of concealment, Honeywell admitted *arguendo* that they had engaged in 15 years of concealment and had willfully violated their affirmative duty to disclose this information to the CPSC.

Jurisdiction for the common law action was based on diversity of citizenship. Section 23 CPSA, 15 U.S.C. Section 2072 specifically provides that the action may be brought ". . . in any district court of the United States . . . ."

The Copleys' complaint was summarily dismissed with the lower court finding that the CPSA does not create a private cause of action for willful nondisclosure of a known serious product hazard. The lower court further held that Honeywell's admitted fraud and concealment did not entitle the Copleys to submit to a jury their claim that the untimeliness of their suit was excused by Honeywell's admitted fraud and admitted willful non-compliance with 16 C.F.R. 1115.

REASONS FOR GRANTING THE WRIT

I. A writ should issue pursuant to Rule 17.1(a) Rules of the United States Supreme Court because a unanimous decision from the United States Court of Appeals, Eighth Circuit, is in clear conflict with a unanimous decision of the Supreme Court of Minnesota.

Introduction

A. Jurisdiction

Petitioners request that a writ be issued to the Sixth Circuit Court of Appeals because Rule 17.1(a) of the Rules of the Supreme Court of the United States specifically suggests review of a question "[w]hen a federal court of appeals . . . has decided a federal question in a way in conflict with a state court of last resort . . ."

B. Abbreviations

For brevity, the following abbreviations will be utilized in Petitioners' brief:

"Rule 17.1(a)" refers to Rule 17.1(a) Rules of the United States Supreme Court.

"Section 15(b)" refers to Section 15(b) of the Consumer Product Safety Act, 15 U.S.C. Section 2064 (b) (1982).

"Section 23(a)" refers to Section 23(a) of the Consumer Product Safety Act, 15 U.S.C. Section 2072 (a) (1982).

"16 C.F.R. Section 1115" refers to the Substantial Product Hazard Notification Regulations promulgated by the CPSC to become effective March 21, 1974.

"**Swenson**" refers to *Swenson v. Emerson Electric Company,* 374 N.W.2d 690 (Minn. 1985). This is the Minnesota Supreme Court decision that held that a violation of 16 C.F.R. Section 1115 creates a private cause of action.

"**Drake**" refers to *Drake v. Honeywell, Inc.,* 797 F.2d 603 (8th Cir. 1986). This is the Eighth Circuit United States Court of Appeals decision that held that a violation of 16 C.F.R. Section 1115 does not create a private cause of action.

The differences between the decisions of the Eighth Circuit in *Drake* and the Supreme Court of Minnesota in *Swenson* fully illustrate not only the conflict itself but the rationale that led each of the courts to their diametrically opposite conclusions. Before analyzing the two decisions, a brief chronology of the specific cases resulting in the Rule 17.1(a) conflict follows.

C. Chronology of the two cases which culminated in the conflict defined by Rule 17.1(a) Rules of the United States Supreme Court.

Swenson v. Emerson Electric Co., 374 N.W.2d 690 (Minn. 1985)

Decided September 20, 1985.

The Supreme Court of Minnesota finds that there is a private cause of action for violation of 16 C.F.R. Section 1115. As indicated, this decision is referred to simply as *Swenson.*

Emerson Electric Co. v. Swenson, 106 S. Ct. 1998 (1986)

Decided May 20, 1986.

This was a petition for a writ of certiorari filed by Emerson Electric Co. in response to the adverse decision in *Swenson*. The petition requested a writ be issued to the Supreme Court of Minnesota. The motion of the Chamber of Commerce of the United States and others for leave to file a brief as an *amicus curiae* was granted. The petition for a writ of certiorari was denied. **At the time of the denial of this petition, there was no conflict as defined in Rule 17.1(a).**

Drake v. Honeywell, Inc., 797 F.2d 603 (8th Cir. 1986)

Decided July 23, 1986.

The United States Court of Appeals, Eighth Circuit, holds that a violation of 16 C.F.R. 1115 does not create a private cause of action. **This decision created the initial Rule 17.1(a) conflict. The decision of the Sixth Circuit for which Petitioners seek this writ is yet another Rule 17.1(a) conflict on the identical question.** As indicated, this decision will be referred to simply as *Drake*.

II. The conflicting decisions of the Supreme Court of Minnesota in Swenson and the Eighth Circuit Court of Appeals in Drake define and illustrate the importance of the question presented.

Section 23(a) contains the words **"any other rule . . . issued by the Commission."** It is these words that are the source of the Rule 17.1(a) conflicting decisions as well as the other conflicting decisions briefed in Section IV of this Petition.

Swenson adopted the strict construction or plain-meaning approach in analyzing the significance of these words.

"Our first task in interpreting a statute is simply to examine the language of the statute and, '[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.' (citations omitted) Section 2072 provides a private cause of action to any person injured by a 'violation of a consumer product safety rule, *or any other rule or order issued by the Commission.*' 15 U.S.C. Section 2072(a). The CPSA defines a 'consumer product safety rule' as a rule which establishes performance or labeling requirements for a product or which bans a product as hazardous. 15 U.S.C. Sections 2052(a)(2), 2056(a). *The CPSA does not define 'rule' as used in the phrase 'any other rule or order issued by the Commission.' We therefore construe the statute literally* and conclude that violation of '*any* other rule . . . issued by the Commission' gives rise to a private right of action under Section 2072. *Swenson* at 699. (emphasis added)

Drake rejected the plain-meaning approach adopted in *Swenson*, holding

"Our investigation, however, only starts with the statutory language. The question whether a statute permits a private right of action is ultimately one of congressional intent. *Drake* at 606.

The Eighth Circuit declined to adopt the rule of statutory construction enunciated by the United States Supreme Court in *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980). In construing another provision of the CPSA, Justice Rehnquist, now Chief Justice, speaking for a unanimous court, stated:

"We begin with the familiar canon of statutory construction that the starting point for interpreting a

statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.* at 108.

Rejecting that proposition, the *Drake* court then reasoned that inasmuch as the statute itself created no private cause of action for failure to report substantiai product hazards, then Congress must not have intended to create a private cause of action for violation of a *rule* promulgated pursuant to the statute. Thus reasoning, the *Drake* court concluded that:

"... *despite the plain meaning of 'rule,'* failure to comply with the Commission's reporting rules does not give rise to a private cause of action." *Drake* at 606. (emphasis added)

The diametrically-opposed opinions in *Drake* and *Swenson* did not end with their differences in applying rules of statutory construction. Both courts drew different conclusions from the federal Administrative Procedure Act and different conclusions from the legislative history.

Using the Administrative Procedure Act as authority, *Swenson* concluded that:

"[A]n interpretive rule is included in the definition of 'rule' in the federal Administrative Procedure Act and that Section 2072 contains no indication that Congress meant to exclude interpretive rules from 'rule' as used in Section 2072." *Swenson* at 700.

In *Drake*, the Court also looked to the federal Administrative Procedure Act for guidance in interpreting the word *rule*. The *Drake* Court, in stark contrast to *Swenson*, opined:

"Our conclusion . . . is reinforced when the problem is viewed through the lens of well-settled principles of administrative law." *Drake* at 606.

"[A] claim of conduct inconsistent with an interpretive rule is advanced only to show that the statute itself has been violated. An action based on a violation of an interpretive rule does not state a legal claim. Being in nature hortatory rather than mandatory, interpretive rules never can be violated." *Drake* at 607.

On the significance of the legislative history of the CPSA, *Drake* and *Swenson,* again, came to different conclusions. *Swenson* held:

"The legislative history of the CPSA reflects no attempt to define 'rule' as used in Section 2072, and contains no discussion of the distinction between substantive and interpretive rules. (citations omitted) We therefore find no 'clearly expressed legislative intention' that contradicts the plain meaning of Section 2072.

Our conclusion is supported by a majority of the federal courts that have ruled on this issue." *Swenson* at 699.

In contrast, *Drake* noted that an earlier House bill and an earlier Senate bill that preceded the final enactment provided no private cause of action for violation of disclosure rules and the *Drake* court, therefore, concluded:

". . . the legislative history is void of any suggestion that Congress intended to provide a private remedy for noncompliance with Commission rules issued pursuant to the Section 15(b) reporting requirement. The legislative history of Section 23(a) *at best presents conflicting intentions.* We cannot on this basis conclude that Congress intended a private cause of action for

an injury resulting from noncompliance with the product hazard reporting rules issued by the Commission." *Drake* at 609.

That two courts (and now a third court, i.e. the Sixth Circuit in *Copley*) could unanimously come to diametrically-opposed decisions and also draw completely different reasoning from the Administrative Procedure Act and the relevant legislative history is a compelling argument for the issuance of the requested writ.

III. While arriving at wholly different conclusions, Drake and Swenson emphatically agreed that the question is substantial.

While Petitioners disagree with both the analysis and the conclusion enunciated in *Drake*, the decision forcefully and succinctly highlighted the significance of the question presented. The court concluded that:

> "*We do not* intend by our holding today to *minimize* either *the important goals sought by* the Act or the vital role played by *the statutory reporting requirements* in achieving them. **Compliance by manufacturers,** distributors, and retailers with Section 15(b) **obviously is critical to the fulfillment of the congressional purpose, to 'protect the public against unreasonable risks of injuries associated with consumer products.'** . . . [I]n a recent policy statement, *the Commission documents its belief that 'there is both a substantial amount of underreporting of the most serious hazards as well as undue delay in filing reports.'* 49 Fed. Reg. 13820, 13821 (1984). The Commission explains that **'[w]hatever the reasons for not reporting, the result is that the safety of the American public can be jeopardized to the extent that large number of persons using or possessing the same**

product remain unaware of the potential risk and are unable to benefit from corrective action that would have been sought by the Commission.' *Id.* at 13822." *Drake* at 611. (emphasis added)

On the importance of the issue for which the writ is requested, *Swenson* stated:

"**The purpose of establishing the CPSC was 'to protect the public against unreasonable risks of injury associated with consumer products'** . . . The CPSC was instructed to establish an Injury Information Clearinghouse for the collection and analysis of injury data . . . **If the CPSC determines that the product defect reported presents a substantial product hazard, it can** require a manufacturer, distributor, or retailer to **notify the general public of the defect.**" (citation omitted) *Swenson* at 703.

"The **disclosure requirements** imposed by the CPSC upon manufacturers, distributors, and retailers **are crucial to the attainment of the CPSA's primary goal: the protection of consumers** . . . The CPSC can protect consumers from dangerous consumer products *only if product hazards are brought to its attention.*" *Id.* at 704. (emphasis added)

IV. The same question has been confronted by other federal courts generating additional conflicting decisions. These other conflicting decisions amplify the importance of the question.

A brief chronology of these other federal cases follows:

Butcher v. Robertshaw Controls Co., 550 F. Supp. 692 (D. Md. 1981)

Decided July 31, 1981.

The *Butcher* Court held that:

"*Of paramount importance* to the efficient functioning of the CPSC *is* a subset of these administrative regulations comprising *what might conveniently be referred to as disclosure rules.*" *Butcher* at 695. (emphasis added)

"[I]t is clear that the Commission cannot and does not rely solely on standards or bans; indeed, *without disclosure provisions such as 16 C.F.R. Section 1115, it would be impossible for the Commission to gain an awareness of substantial product hazards* in order to begin thinking about bans or standards **in the first place**." *Id.* at 696. (emphasis added)

In contrast to *Drake, Butcher* specifically adopted the rule of statutory construction enunciated in *Consumer Prod. Safety Comm. v. GTE Sylvania,* 447 U.S. 102, 108 (1980).

"If Congress had wished to limit the cause of action to violations of only such safety rules, it could easily have done so, but the inclusion of the phrase 'or any other rule' belies any such intention." *Butcher* at 699.

Quoting from *United States v. Anaconda Co.,* 445 F. Supp. 486, 494 (D.D.C. 1977), the *Butcher* decision noted:

"Remedial safety legislation such as the Act [CPSA] should be broadly construed to effectuate its purpose. **The court should not create a loophole that might work to the injury of public protection** through a technical construction." (citation omitted) *Id.* at 699. (emphasis added)

Young v. Robertshaw Controls Co., 560 F. Supp. 288 (N.D. N.Y. 1983)

Decided March 7, 1983.

The *Young* court held that noncompliance with the notification requirements in 16 C.F.R. Section 1115 created a private cause of action. The court noted

> "*Defendant's contention* that the violation of a disclosure rule does not entitle plaintiff to maintain a private action . . . *flies in the face of this unambiguous language.*" *Young* at 292. (emphasis added)

Payne v. A. O. Smith Corp., 578 F. Supp. 733 (S.D. Oh. 1983)

Decided November 14, 1983.

Payne adopted the plain language rationale reflected in those cases that have held that a violation of disclosure rules is actionable. *See Payne* at 738

Morris v. Coleco Industries, 587 F. Supp. 8 (E.D. Va. 1984)

Decided March 16, 1984.

This decision arguably adopts the reasoning in *Drake*. However, the *Swenson* decision opined that this very terse decision is distinguishable. *See Swenson* at 700.

Preston v. Honeywell, Inc., No. 83-CV-1036 (N.D. N.Y. September 26, 1984)

Decided September 26, 1984.

Citing *Young v. Robertshaw Controls Co.*, 560 F. Supp. 288 (N.D. N.Y. 1983), the District Court, in an unpublished order, denied Honeywell's motion for dismissal of an action alleging a cause based on violation of disclosure requirements in 16 C.F.R. Section 1115.

Swenson v. Emerson Electric Co., 356 N.W.2d 313 (Minn. App. 1984)

Decided October 2, 1984.

This is the lower court decision which was sustained in *Swenson.* The Court held:

> *"The wording of the statute is plain, simple and straightforward,* and the words must therefore be accorded their normal meaning." 356 N.W.2d at 317. (emphasis added)
>
> "Even if appellants' characterization of the cited regulations is correct, actions alleging violations of the regulations are cognizable under the *plain language* of Section 2072." *Id.* (emphasis added)

Wilson v. Robertshaw Controls Co., 600 F. Supp. 671 (N.D. Ind. 1985)

Decided January 8, 1985.

Wilson is yet another decision in which a federal district court found that a private cause of action does exist for failure to comply with the notification requirements of 16 C.F.R. Section 1115. The Court held:

> "The second category of rules [administrative rules] . . . facilitates the administration of the CPSC and its statutory duties. *Crucial among these is the subset of regulations comprising the disclosures rules. Wilson* at 673, 674. (emphasis added)
>
> 'Defendant's contention that 16 C.F.R. Section 1115, an "interpretive" rule, is not a "rule" within the meaning of the Administrative Procedure Act, 5 U.S.C. Section 551, et seq. . . . is wholly without merit.' *Id.* at 675 (quoting *Young v. Robertshaw Controls,* 560 F. Supp. at 292-93).
>
> . . .
>
> *The language* of the statute at issue *is plain and straightforward and* the words, therefore, *must be accorded their plain meaning."* *Id.* (emphasis added)

Drake v. Lochinvar Water Heater, Inc., 618 F. Supp. 549 (D. Minn. 1985)

Decided March 21, 1985.

This is the federal district court decision which was overruled in *Drake*. In contrast to the Eighth Circuit, the lower court held:

> ". . . Honeywell is fighting an uphill battle, in that Honeywell's analysis fails to account for the plain meaning of the statutory language, the statute's legislative history, or rather, the lack thereof, and the overwhelming weight of contrary judiciary authority." 618 F. Supp. at 551.

The Court further held that Honeywell's contention that the term "other rule" in Section 23(a) refers only to substantive rules is a view that ". . . 'flies in the face' of the unambiguous language of the statute." *Id.*

> "[T]here is no indication whatsoever in the language of section 2072(a) to limit 'other rules' to the species of rules defined by Honeywell. In addition, there is no statutory language revealing an intent to exclude interpretive rules from the scope of Section 2072(a). *Id.*

Kahn v. Sears, Roebuck & Co., 607 F. Supp. 957 (N.D. Ga. 1985)

Decided March 26, 1985.

Reaching the same conclusion as *Drake*, the court stated: "This court holds that Section 2072 was intended to give a cause of action only for the violation of a substantive rule promulgated by the Commission and not to any administrative rule which simply interprets the statute with respect to filing information with the Commission." *Kahn* at 958, 959. (emphasis added)

V. The question presented is of great public importance because it directly impacts public health and safety.

As reflected in the respective opinions in *Swenson* and *Drake,* **both Courts agreed that the question presented was very important to the issue of public safety.** See quotations from *Drake* and *Swenson,* pp. 16, 17 *supra.* The recognition of the importance of this question was well founded.

The CPSA was enacted as a result of a three (3) year study by the National Commission on Product Safety. In June of 1970, this bipartisan commission reported to the President and the Congress the result of its three (3) year study. *See* National Commission on Product Safety, *Final Report* (June 1970).

The Commission noted that the Congress had requested it to respond to a critical question, namely "What is the measure of exposure of American consumers to unreasonable product hazards?" *Id.* at 1. In response to that question, the Commission reported:

> **"Measure of Exposure**
>
> **Americans—20 million of them—are injured each year in the home as a result of incidents connected with consumer products. Of the total, 110,000 are permanently disabled and 30,000 are killed. A significant number could have been spared if more attention had been paid to hazard reduction. The annual cost to the Nation of product-related injuries may exceed $5.5 billion.**
>
> The exposure of consumers to unreasonable consumer product hazards is excessive by any standard of measurement." *Id.*

It is indisputable that the disclosure requirements are critically related to the structure, purpose and efficacy of the CPSA. *See* both *Drake* and *Swenson.* The CPSC so declared in a recent publication entitled "Statement of Enforcement Policy on Substantial Product Hazard Reports." In that publication, the CPSC made the following comments:

> "[T]he Commission believes that there is an extensive amount of underreporting especially of the more significant hazards." Statement of Enforcement Policy on Substantial Product Hazard Reports, 49 Fed. Reg. 13820 (1984) (to be codified at 16 C.F.R. Section 1115).
>
> "The *Section 15 reporting requirements are critical* to the Commission in administering its statutory responsibilities." *Id.* (emphasis added)
>
> **"These reports provide a key basis for evaluating a potential hazard and the need, if any, for corrective action in the form of public notice . . . ."** *Id.*
>
> "The Commission is particularly disturbed by the fact that, *of the 25 most serious hazard files opened* by the Commission . . . *only 5 resulted from Section 15 reports by firms.*" *Id.* at 13821. (emphasis added)

Most interestingly, *the statement* from the CPSC *reflects the Commission's belief* "*. . . that Section 23* of the CPSA *provides a private cause of action* for injuries sustained *because of a* manufacturer's alleged *failure to disclose* Section 15(b) information to the Commission." *Id.* (emphasis added) This statement reflects the Commission's belief that the availability of this private sanction was both intended by the Congress and is critical to the obtainment of its statutory goal.

The question which this Court should address is whether or not the Commission is correct in its belief that the purpose of the CPSA was to be facilitated by the granting of a private cause of action to a consumer injured by a wilful violation of the disclosure rules.

VI. Summarily enforcing statute of limitations where defendant admits to willful and fraudulent withholding of a self-concealing reportable defect creates a cynical disincentive to report substantial product hazards as required by 16 C.F.R. Section 1115.

The Sixth Circuit ruled that Honeywell's admitted willful and fraudulent noncompliance with its affirmative duty to report the dangerous and self-concealing defect did not entitle the Copleys to a hearing on the question of whether or not their failure to timely discover the concealed defect excused the untimely commencement of their common law action.

The Sixth Circuit refused to apply a well-accepted equitable tolling principle as enunciated by the United States Supreme Court. Speaking of the statute of limitations, the United States Supreme Court has stated:

> "They were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed . . . **To hold that by . . . committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the Statute of Limitations to protect it, is to make the law which was designed to prevent fraud, the means by which it is made successful and secure.**" *Bailey v. Glover,* 88 U.S. (21 Wall.) 342, 349 (1875)

The Sixth Circuit's error is devastating to the attainment of the public safety goal of the CPSA. It creates a cynical disincentive to comply with a manufacturer's duty to disclose.

The greater the potential for severe injury, the greater will be the incentive to conceal. Self-concealing defects require compliance more so than any other kind of defect. Notwithstanding this necessity, the lower court granted Honeywell and other manufacturers a carrot for willful noncompliance and fraud, namely the potential for summary extinguishment of otherwise serious and meritorious claims. The result is contrary to fundamental principles of equity enunciated by this Court and is inimical to the public safety goals which are the very essence of the CPSA.

Interestingly, the National Commission on Product Safety, in a chapter specifically dealing with the "impact of the common law on consumers", cited statute of limitation defenses, among other things, as giving manufacturers an unfair advantage in product litigation. National Commission on Product Safety, *Final Report* (June 1970) at 73.

CONCLUSION

1. The question presented is critical to the primary goal of the CPSA, namely the reduction of serious injuries by notification to the public of known serious product hazards.

2. The rules of the United States Supreme Court establish criteria for the review of conflicts between lower courts. The Sixth Circuit decision is the second United States Court of Appeals decision on the identical question that falls foursquare within those criteria.

3. The *Drake* decision and the Sixth Circuit's decision are contrary to the "overwhelming weight . . . of judicial authority." 618 F. Supp at 551.

4. Resolution of this important public safety-related question by the Supreme Court of the United States should not seriously burden the Court. The question presented is a straightforward issue of statutory construction involving the meaning of three (3) words, namely "any other rule".

5. The lower court's creation of a disincentive for compliance with 16 C.F.R. Section 1115 is contrary to a fundamental equitable principle, namely that no one will be permitted to gain an advantage or be rewarded by admitted acts of fraud.

Respectfully submitted,

JAMES T. MURRAY, *Counsel of Record*
MURRAY & MURRAY CO., L.P.A.
300 Central Avenue
Sandusky, Ohio 44870
Telephone: (419) 627-9700
Attorneys for Petitioners

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed May 20, 1987)

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

No. 86-3360

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM COPLEY; PATSY COPLEY; and DALE COPLEY,
Plaintiffs-Appellants,

v.

HEIL-QUAKER CORPORATION; HONEYWELL, INC.; SEARS, ROEBUCK & COMPANY; PHILLIPS BOTTLED GAS COMPANY; and FREY & SONS,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Before: MARTIN, JONES, and MILBURN, *Circuit Judges.*

PER CURIAM. This case stems from injuries sustained by William Copley when a gas furnace exploded in his home. Copley, his wife, and son appeal the district court's entry of summary judgment for the defendants based on the Copleys' failure to comply with the statute of limitations. We affirm.

In December 1975 Copley awoke to find his furnace inoperative. He went to the basement where he smelled

liquid propane gas and heard a hissing noise. He manually closed the gas valve and attempted to turn on an electric fan to disburse the gas prior to relighting the pilot light. A spark from the fan ignited the gas and Copley was severely burned.

The furnace was manufactured by Heil-Quaker, a Delaware corporation with its principal place of business in Tennessee. The gas valve was manufactured by Honeywell, Inc., a Delaware corporation with its principal place of business in Minnesota.

The Copleys filed a personal injury action against Heil-Quaker in federal court in Ohio in August 1982. They filed a common law action for negligence and breach of warranty against Honeywell in federal court in Minnesota in September 1982. Also in September they amended their Ohio complaint to assert a statutory claim against Honeywell, alleging violation of the Consumer Product Safety Commission's reporting rules. The Minnesota cause of action was transferred to Ohio and the cases consolidated. The district court granted summary judgment to both defendants based on its determination that the claims were time-barred.

The statute of limitations for personal injury actions in Ohio is two years. Ohio Rev. Code § 2305.10. The statutory period under Minnesota law for the common law claims is six years for negligence and four years for breach of warranty. Minn. Stat. §§ 541.05(5), 336.2-725. Minnesota law determines the applicable period for these claims because of the general federal rule, as applied in this circuit, that when diversity actions are transferred for the convenience of the parties under 28 U.S.C. § 1404(a), the state law of the transferor court should be applied. *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964); *Martin v. Stokes*, 623 F.2d 469, 473 (6th Cir. 1980).

The Copleys filed suit in September 1982, approximately six years and nine months after the December 1975 explosion. They argue that their complaint against Honeywell is timely, however, because the limitations period should be tolled under the doctrine of fraudulent concealment. We find this argument unpersuasive. The doctrine of fraudulent concealment is commonly applied in instances where a defendant by fraud has prevented a plaintiff from learning of his cause of action. *DeCosse v. Armstrong Cork Co.*, 319 N.W.2d 45 (Minn. 1982); *Couillard v. Charles T. Miller Hosp., Inc.*, 253 Minn. 418, 92 N.W.2d 96 (1958). In such cases, the statute of limitations is tolled until the cause of action is discovered or could have been discovered through due dilligence. In the current case plaintiffs knew Copley had been injured at the time of the explosion and knew immediately that the source of his injury was the furnace. Shortly after the accident, a plumber told Patsy Copley that in his opinion the explosion was caused by the Honeywell valve. He retained the valve in the event she later needed it. Thus, even assuming that Honeywell did act fraudulently, its conduct did not prevent the Copleys from uncovering material facts necessary to the commencement of their action.

William Copley also argues that the limitations period should be tolled because of his alleged disability as a result of the explosion. However, under Minnesota law a plaintiff's disability

> existing at the time when a cause of action accrued or arising anytime during the period of limitation, shall suspend the running of the period of limitation until the same is removed; provided that such period, except in the case of infancy, shall not be extended for more than five years, nor in any case for more than one year after the disability ceases . . . .

Minn. Stat. § 541.15. Thus, William Copley, who was allegedly disabled until March 1980, would have had until March 1981 to file his claim. The claim of his son, who reached majority in December 1976, is also time-barred under the statute.

Further, we find the Copleys' statutory complaint seeking damages for violations of the reporting requirements of the Consumer Product Safety Commission, 15 U.S.C. § 2064(b), to be controlled by the reasoning stated in *Drake v. Honeywell, Inc.*, 797 F.2d 603 (8th Cir. 1986) (failure to comply with the Commission's reporting rules does not give rise to a private cause of action). Accordingly, the claims against Honeywell were properly dismissed by the district court.

With regard to the Copleys' claim against Heil-Quaker, the cause of action for personal injury accrued at the time of the accident. The applicable limitations period is two years. Mrs. Copley's cause of action commenced to run immediately, Mr. Copley's commenced, at the latest, on the cessation of his alleged incapacity in March 1980, and Dale Copley's commenced when he reached majority. Thus, even if each is given the benefit of Ohio's disability statute, Ohio Rev. Code § 2305.16, none was timely when filed in September 1982.

Finally, plaintiffs argue that Heil-Quaker should not be permitted to have the benefit of Ohio's statute of limitations unless and until it obtains a license to do business in Ohio. Because we find the application of Ohio's saving clause, Ohio Rev. Code § 2305.15, to be in violation of the commerce clause of the Constitution, *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, No. 85-3784 (6th Cir. May ...., 1987), we affirm the decision of the district court dismissing as untimely plaintiffs' claim against Heil-Quaker.

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed March 25, 1986)

Case No. C 82-512

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

WILLIAM COPLEY, *et al.*,
Plaintiffs,

vs.

HEIL-QUAKER CORPORATION, *et al.*,
Defendants.

OPINION AND ORDER

POTTER, *J.*:

This matter is before the Court on defendant Honeywell, Inc.'s (hereafter Honeywell) motion for summary judgment, plaintiffs' opposition thereto and plaintiffs' supplemental memoranda, plaintiffs' unopposed motion for leave to reply instanter to the separate answers of Honeywell, third-party defendant Sears, Roebuck & Company's (hereafter Sears) motion to dismiss, Honeywell's opposition thereto, Sears' reply and several addenda to said motion, and the unopposed motion of Sears to stay discovery.

During a pretrial conference held October 3, 1985, the Court granted Sears' unopposed oral motion that the Court withhold ruling on the motions of Sears to stay discovery and to dismiss until such time as the Court

had rendered its decision as to Honeywell's motion for summary judgment. On December 20, 1985, a hearing was held on Honeywell's motion for summary judgment. Said motion and the issues therein raised are before the Court on the depositions, answers to interrogatories and admissions on file, the pleadings, affidavits, and the various memoranda and the oral arguments of the respective parties.

This personal injury action arises out of a gas explosion that occurred on December 12, 1975. Plaintiffs William Copley and Patsy Copley are husband and wife, and are the parents of plaintiff Dale Copley. On August 24, 1982, plaintiffs commenced a personal injury action in this Court against Heil-Quaker Corporation. On September 7, 1982, plaintiffs filed a complaint in the United States District Court for the District of Minnesota, Fourth Division, thereby commencing a personal injury action against Honeywell, alleging, *inter alia*, negligence, breach of express and implied warranties and fraudulent concealment. On September 9, 1982, plaintiffs filed their first amended complaint in this Court by which Honeywell, Inc., *inter alia*, was added as a defendant to the Ohio case, thereby commencing plaintiffs' personal injury action against Honeywell under Section 23 of the Consumer Product Safety Act (hereafter CPSA), 15 U.S.C. §2072.

The Minnesota District Court originally granted Honeywell's motion for dismissal on the grounds that plaintiffs' claims against Honeywell were barred by the applicable statutes of limitations and that "none of the conceivable bases for tolling the statute of limitations suggested by the Complaint would extend the limitation period sufficiently to make plaintiffs' action timely. . . ."

Thereafter, plaintiffs filed a motion for reconsideration in which they argued that the statute of limitations had been tolled as a result of Honeywell's fraudulent concealment of certain relevant facts. Specifically, plaintiff Patsy Copley asserted by affidavit that after the explosion in her home she made an investigation into the safety of the subject gas control valve, but dropped the matter after being led to believe the control valve was safe. The Minnesota court vacated its dismissal of plaintiffs' case against Honeywell on the ground that plaintiffs' action against Honeywell should not be dismissed at the pleading stage and plaintiffs should have an opportunity to further develop their case against Honeywell. The Minnesota District Court subsequently transferred the case to this Court pursuant to 28 U.S.C. §1404(a).

By its order of March 6, 1984, this Court, *inter alia*, consolidated the transferred Minnesota case with plaintiffs' CPSA action in this Court, determined both that the statute of limitations governing plaintiffs' claims is set forth in Ohio Rev. Code §2305.10 and that any tolling provision set forth in OHIO REV. CODE §2305.16 is inapplicable to the case *sub judice*, and denied Honeywell's motion for judgment on the pleadings or, in the alternative, for summary judgment, finding, as did the Minnesota court, that it would be inappropriate at the pleading stage to grant such a motion because a genuine issue of fact then existed with respect to the fraudulent concealment issue.

Plaintiffs' complaint, as amended, alleges that in late 1967, plaintiffs William and Patsy Copley purchased a gas furnace incorporating a defective gas control valve manufactured by Honeywell. Plaintiffs further allege that on December 12, 1975 a gas explosion occurred in

the Copley home as a result of the failure of the Honeywell gas control value to shut off the flow of liquid propane gas upon pilot light outage. Plaintiffs claim that as a result of the December 12, 1975 gas explosion they suffered "catastrophic injuries" which were proximately caused by the defective Honeywell gas control valve.

Honeywell moves this Court, pursuant to Fed.R.Civ.P. 56(b) and (c), for summary judgment against plaintiffs on the ground that there is no genuine issue as to any material fact and that Honeywell is entitled to judgment as a matter of law. Specifically, Honeywell contends that it is entitled to summary judgment on the ground that "each plaintiff's . . . cause of action against Honeywell is barred by applicable statutes of limitation." Honeywell maintains that since the Minnesota action and the Ohio action were commenced against Honeywell on September 8, 1982 and September 9, 1982 respectively, that is, approximately six years and nine months after the December 12, 1975 explosion, on the face of the respective complaints, both lawsuits were barred respectively by Minnesota's four-year and six-year statutes of limitations and Ohio's two-year statute of limitations for personal injury actions.

For purposes of Honeywell's motion for summary judgment, Honeywell concedes *arguendo* that "it engaged in acts of concealment as alleged by plaintiffs." Notwithstanding, Honeywell contends that any such concealment by it in no way affected plaintiffs' knowledge either of their injuries or of the connection of the Honeywell gas control valve to plaintiffs' injuries, that is, that the gas explosion causing plaintiffs' injuries was caused by the allegedly defective Honeywell gas control valve. Specifically, Honeywell contends that because William Copey's physical injuries were immediately apparent and because plaintiffs were informed within six months of the

date of the explosion that the gas control valve both was manufactured by Honeywell and had caused the explosion, plaintiffs had sufficient knowledge to bring an action against Honeywell within the applicable statute of limitations periods.

Honeywell maintains that although plaintiffs were informed early on that the Honeywell valve had leaked, thereby failing to shut off the gas, plaintiffs did not diligently inspect the valve or cause any further investigation regarding the valve or the accident to be undertaken until the Spring of 1982. Honeywell asserts that plaintiffs never contacted Honeywell directly after learning that the Honeywell gas control valve had leaked. Honeywell further asserts that it never denied manufacturing the subject gas control valve nor made any representations to plaintiffs to lead them to believe that the Honeywell valve had not caused the December 12, 1975 gas explosion. In sum, Honeywell contends that plaintiffs injuries were patent and, therefore, plaintiffs knew of their injuries, that within six months of the accident it was determined that the Honeywell gas control valve was the cause of the explosion, and that the subject valve was available for further inspection and testing. Notwithstanding, plaintiffs failed to commence both the Ohio and Minnesota actions against Honeywell until after the applicable statute of limitations periods had expired. Finally, Honeywell maintains, in essence, that given the state of plaintiffs' knowledge of the facts relevant to their causes of action, plaintiffs' causes of action against Honeywell accrued no later than six months after the December 12, 1975 accident and are, therefore, barred by the applicable statutes of limitations, none of which are tolled or extended in this case by Minnesota's fraudulent concealment doctrine or Ohio's discovery rule since neither of the foregoing applies to

cases of non-latent personal injuries where the connection between plaintiffs' injuries and the cause thereof is apparent.

In their opposition to Honeywell's motion for summary judgment, plaintiffs appear not to contest defendant's assertion that from the face of plaintiffs' complaint, it is clear that the statute of limitations period applicable to each of plaintiffs' causes of action whether under the CPSA or under either Ohio or Minnesota law, elapsed prior to commencement of plaintiffs' actions against Honeywell. Notwithstanding, plaintiffs maintain, in essence, that Honeywell's fraudulent concealment of the very design defect both of the Honeywell gas control valve which caused the December 12, 1975 explosion and of the entire Honeywell V8280 family of such valves, either tolls the running of the applicable statutes of limitations or estops Honeywell from asserting the statute of limitations defense with respect both to plaintiffs' common law products liability claims and their claim for relief under the CPSA.

Specifically, plaintiffs contend that Honeywell engaged in a continuous course of conduct which was calculated to conceal the very design defect of the Honeywell gas control valve which plaintiffs claim caused the December 12, 1975 explosion. Plaintiffs further contend that the subject design defect—the "stick-down" problem—of the V8280 family of Honeywell gas control valves was discovered by Honeywell at least nine years before the gas explosion which is the subject of this lawsuit. Plaintiffs claim that, notwithstanding the foregoing and the fact that the "stick-down" problem may not be discoverable before or after an explosion other than by someone who is already cognizant of said design defect, Honeywell failed to comply with the disclosure requirements of the CPSA. Plaintiffs assert that they have, in fact, acted diligently

regarding their efforts to ascertain the specific cause of the gas explosion. Moreover, plaintiffs maintain that their ignorance of the gas control valve design defect resulted from Honeywell's fraudulent concealment of the "stick-down" problem, rather than from their lack of diligence, and therefore, there is no reason why plaintiffs' ignorance should not prevent the running of a statute of limitations in favor of the wrongdoer, Honeywell.

Plaintiffs assert that since they have a private cause of action under the CPSA, 15 U.S.C. §2072(a), the issue *sub judice* is when did the statute of limitations with respect to said cause of action commence to run. Plaintiffs argue, in essence, reason dictates that their cause of action under 15 U.S.C. §2072(a) for Honeywell's failure to disclose information cannot be summarily dismissed due to plaintiffs' failure to timely commence their action as a result of being without the very information which Honeywell was required by the CPSA to disclose. Plaintiffs further argue that their common law claims are likewise preserved.

Honeywell has moved, pursuant to Fed.R.Civ.P. 56(b), for summary judgment. Fed.R.Civ.P. 56(c), in pertinent part, provides that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(e), in pertinent part, provides that "[w]hen a motion for summary judgment is made and supported . . ., an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or . . . otherwise . . ., must set forth specific facts showing that there is a genuine issue for trial. If he does not so re-

spond, summary judgment, if appropriate, shall be entered against him."

Summary judgment is appropriate and may be granted only where there is no genuine issue with respect to the material facts of the case. *Mozert v. Hawkins County Public Schools,* 765 F.2d 75, 78 (6th Cir. 1985), *citing, County of Oakland v. City of Berkley,* 742 F.2d 289, 297 (6th Cir. 1984); *In re Atlas Concrete Pipe, Inc.,* 668 F.2d 905, 908 (6th Cir. 1985). A court may not properly resolve disputed questions of fact in a summary judgment decision, and if a disputed question of material fact exists, the court should deny the motion for summary judgment and proceed to trial. See *In re Atlas Concrete Pipe, Inc.,* 668 F.2d at 908. Indeed, the very purpose of a motion for summary judgment is to eliminate a trial where it would be unnecessary and merely result in delay and expense. *Bouldis v. U.S. Suzuki Motor Corp.,* 711 F.2d 1319, 1324 (6th Cir. 1983). Although summary judgment is a useful and often efficient device for deciding appropriate cases, it must be employed only with extreme caution for it operates to deny a litigant his day in court. *Smith v. Hudson,* 600 F.2d 60, 63 (6th Cir. 1979), *cert. dismissed,* 444 U.S. 986 (1979). If the record evidence plainly reveals that no dispute as to any material fact exists, the case should be decided as a matter of law rather than be submitted to a jury. *Bouldis,* 711 F.2d at 1324, *citing, Davis-Watkins Co. v. Service Merchandise,* 686 F.2d 1190, 1197 (6th Cir. 1982), *cert. denied sub nom. Service Merchandise Co. v. Amana Refrigeration, Inc.,* 466 U.S. 931 (1984). See also *Smith v. Hudson,* 600 F.2d at 64-65.

The United States Court of Appeals for the Sixth Circuit has interpreted Fed.R.Civ.P. 56(c) to require that "the District Court . . . review the entire record before deciding whether to render a decision on the merits."

Smith v. Hudson, 600 F.2d at 64. Moreover, a party is never required to respond to a motion for summary judgment in order to prevail thereon since the burden of establishing the nonexistence of genuinely disputed material fact always rests with the movant. *Smith v. Hudson, supra, citing, Adickes v. Kress & Co.,* 398 U.S. 144, 160 (1970) (other citations omitted).

In ruling on a motion for summary judgment, the Court's function is to determine with respect to any fact which is material to the issues *sub judice,* if any genuine issue exists, not to resolve disputed factual issues, and to deny summary judgment if such an issue does exist. *United States v. Diebold, Inc.,* 369 U.S. 654 (1962); *Tee-Pak, Inc. v. St. Regis Paper Co.,* 491 F.2d 1193 (6th Cir. 1974). Further, "[i]n ruling on a motion for summary judgment, the Court must construe the evidence in its most favorable light for the party opposing the motion and against the movant." *Bohn Aluminum & Brass Corp. v. Storm King Corp.,* 303 F.2d 425, 427 (6th Cir. 1962). See also *Brown v. Johnstone,* 5 Ohio App.3d 165, 167 (Summit County Ct. App. 1982). If reasonable minds could differ as to a material fact in issue, then a genuine factual dispute exists and the motion for summary judgment must be denied.

Having thoroughly reviewed the entire record in this case—"the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits"—including the declarations of plaintiffs contained in their response to Honeywell's motion for summary judgment and viewing said pleadings, affidavits and the other materials on file in this case in a light most favorable to plaintiffs, the Court finds that there is no genuine issue as to any material fact which makes the granting

of summary judgment inappropriate. The Court further finds that no genuine issue exists with respect to any fact which is material to the issues *sub judice.*

Upon consideration, the Court finds that the following facts which are material to the issues *sub judice* are undisputed and, therefore, that no genuine issue exists with respect to said facts. The gas explosion which is both the source of plaintiffs' injuries and the subject of this lawsuit occurred on December 12, 1975. (William Copley deposition, p. 8; Patricia Copley deposition, p. 6). As soon as the explosion occurred, William Copley's injuries were immediately apparent. (P. Copley deposition, p. 8; W. Copley deposition, pp. 120, 184; second amended complaint, ¶13). William Bloom, a plumbing and heating installer (William Bloom deposition, p. 24), investigated the accident and inspected plaintiffs' furnace on December 12, 1975 (W. Bloom deposition, p. 36), at which time Bloom removed the Honeywell gas control valve. (W. Bloom deposition, pp. 34, 36). Bloom determined both that the Honeywell gas control valve was faulty in that it had allowed gas to leak and that said valve had caused the explosion. (W. Bloom deposition, pp. 34-35, 79, 91, 94, 118; P. Copley deposition, pp. 23-24). Within six months of the date of the gas explosion, Bloom informed Patricia Copley that the valve had leaked and that the faulty valve had caused the explosion. (W. Bloom deposition, pp. 94-95, 99, 133; P. Copley deposition, pp. 23-24). Patricia Copley communicated Bloom's opinion that the Honeywell gas control valve had leaked and had caused the explosion, to William Copley. (W. Copley deposition, pp. 177-178).

The Court finds that it is undisputed that at the time of the accident plaintiffs knew of their injuries and

that within six months of the date of the explosion, to wit, June of 1976, plaintiffs knew that a gas control valve manufactured by Honeywell had caused the explosion by allowing gas to leak upon pilot light outage. The Court further finds that the only remaining question is whether or not defendant is entitled to judgment as a matter of law. A limitation of action issue can be resolved as a matter of law if the undisputed facts establish the time when a plaintiff's cause of action accrued. *American Hotel Management Associates, Inc. v. Jones*, 768 F.2d 562, 568 (4th Cir. 1985).

A civil action such as the case *sub judice* is commenced by the filing of a complaint with the Court. Fed.R.Civ.P. 3. A civil action, unless a different limitation is prescribed by statute, can be commenced in Ohio only within the period prescribed in Ohio Rev. Code §§2305.03 to 2305.22. See OHIO REV. CODE §2305.03. Cf. 34 O.Jur.2d, *Limitation of Actions* §17 (2d ed. 1958).

Section 2072 of Title 15 of the United States Code, by its express terms, provides plaintiffs in this case with a private right of action.[1] See, e.g., *Wilson v. Robertshaw Controls Co.*, 600 F. Supp. 671, 675 (N.D. Ind. 1985); *Payne v. A. O. Smith Corp.*, 578 F. Supp. 733, 736 (S.D. Ohio 1983); *Swenson v. Emerson Electric Co.*, 374 N.W.2d 690, 699 (Minn. Sup. Ct. 1985). Neither 15 U.S.C. §2072, nor any other provision of the CPSA nor the legislative history of the CPSA, see 1972 U.S. CODE CONG. & AD. NEWS

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1. Section 2072(a) of Title 15 of the United States Code, in pertinent part, provides:

> Any person who shall sustain injury by reason of any knowing . . . violation of a consumer product safety rule, or any other rule or order issued by the [Consumer Products Safety] Commission may sue any person who knowingly . . . violated any such rule or order in any district court of the United States in the district in which the defendant resides or is found or has an agent. . . .

4573 *et seq.*, discusses a statute of limitations to be applied to a private action brought under 15 U.S.C. §2072(a). In such cases where an express Congressional directive is absent as is often the case in federal civil law, the United States Supreme Court has instructed that courts apply the most closely analogous statute of limitations under state law. See *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983). Cf. *IDS Progressive Fund, Inc. v. First of Michigan Corp.*, 533 F.2d 340, 342 (6th Cir. 1976); 2 J. Moore, J. Lucas, H. Fink & C. Thompson, MOORE'S FEDERAL PRACTICE ¶ 3.07[2] (2d ed. 1985).

The Court is of the opinion that plaintiffs' action brought under 15 U.S.C. §2072(a) clearly is in the nature of a personal injury action based on defendant's alleged failure to comply with the reporting and disclosure requirements of the CPSA and the rules promulgated thereunder. Accordingly, as this Court held in its March 6, 1984 memorandum and order, the statute of limitations applicable to plaintiffs' claim under the CPSA, 15 U.S.C. §2072, is stated at OHIO REV. CODE §2305.10,[2] which, in pertinent part, provides:

> An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

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2. But see *Payne v. A. O. Smith Corp.*, 578 F. Supp. 733 (S.D. Ohio 1983), wherein the court held that the differences between the CPSA and a "garden variety" tort action are sufficient to disclaim the applicability of OHIO REV. CODE §2305.10 to actions under the CPSA. After determining that the analogous Ohio limitations period would appear to be either OHIO REV. CODE §2305.09 (four years for fraud or for torts not enumerated elsewhere) or OHIO REV. CODE §2305.07 (six years for liability created by statute), the *Payne* court opted to apply §2305.09 to the CPSA case *sub judice*, finding "that a CPSA action does partake of elements of a typical tort, even if it is not identical to same." *Payne*, 578 F. Supp. at 737.

OHIO REV. CODE §2305.10 governs all actions the real purpose of which is to recover damages for injury to the person and losses incident thereto. 34 O.Jur.2d, *Limitation of Actions* §51 (2d ed. 1958 & Supp. 1985). See also *id*, at §17. The limitation is imposed on the cause of action, and the form in which the action is brought is immaterial. *Id.*

Plaintiffs' common law personal injury claims based on negligence and breach of express and implied warranties would, under Ohio law, be similarly subject to the strictures of OHIO REV. CODE §2305.10. See, e.g., *Clutter v. Johns-Manville Sales Corp.*, 646 F.2d 1151, 1157 (6th Cir. 1981), *citing, Mahalsky v. Salem Tool Co.*, 461 F.2d 581 (6th Cir. 1972). Cf. *Lee v. Wright Tool & Forge Co.*, 48 Ohio App.2d 148 (Summit County Ct. App. 1975); 34 O.Jur.2d, *supra*, at §§17, 51. Under Minnesota law, plaintiffs' breach of warranty claims in this personal injury action would be subject to a limitation period of four years pursuant to MINN. STAT. §336.2-725(1),[3] *Mader v. American Motors Corp.*, 611 F. Supp. 877, 879 (D.C. Minn. 1985), and plaintiffs' negligence claim would be subject to the six year limitations period imposed by MINN. STAT. §541.05 (5),[4] *Mader v. American Motors Corp., supra; Karjala v.*

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3. MINN. STAT. §336.2-725, in pertinent part, provides:

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued . . . . (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach . . . . [W]here a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered . . . . (4) This section does not alter the law or tolling of the statute of limitations. . . .

4. MINN. STAT. §541.05, in pertinent part, provides:

Subdivision 1. Except where the uniform commercial code otherwise prescribes, the following actions shall be com-

(Continued on following page)

Johns-Manville Products Corp., 523 F.2d 155, 160 (8th Cir. 1975).

A statute of limitations is a product of legislation, but it is the judiciary's task to interpret and enforce such an enactment. *McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 665 (3d Cir. 1980) (applying Ohio law), *cert. denied*, 449 U.S. 976 (1980). In other words, "[a]bsent legislative definition, it is left to the judiciary to determine when a cause 'arose.'" *O'Stricker v. Jim Walter Corp.*, 4 Ohio St.3d 84, 87 (1983), *citing*, *Harig v. Johns-Manville Products Corp.*, 284 Md. 70, 75, 394 A.2d 299, 302 (1978).

The judiciary of Ohio has developed a "discovery rule" with respect to the accrual of a cause of action regarding a latent injury. Most jurisdictions employing a "discovery rule" have held that such a rule does not require that a plaintiff have actual knowledge of the liability of a manufacturer of an allegedly defective product before the limitations period commences to run, only that a plaintiff reasonably should know that an injury was wrongfully caused. See, e.g., *Curry v. A. H. Robbins Co.*, 775 F.2d 212, 216 (7th Cir. 1985). Cf. *Drake v. B. F. Goodrich Co.*, No. 84-5665, slip op. (6th Cir. February 5, 1986).

The Ohio discovery rule provides that "[w]hen an injury does not manifest itself immediately, the cause of action does not arise until the plaintiff knows or, by the exercise of reasonable diligence should have known, that he had been injured by the conduct of defendant. . . ." *O'Stricker*, 4 Ohio St.3d at 90. The discovery rule as

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Footnote continued—

menced within six years: (1) Upon a contract or other obligation, express or implied, as to which no other limitation is expressly prescribed; . . . (5) . . . [F]or any other injury to the person or rights of another, not arising on contract, and not hereinafter enumerated. . . .

articulated by the Ohio Supreme Court in *O'Stricker*[5] is a two-pronged rule requiring that before the statute of limitations begins to run, "a plaintiff must know or reasonably should have known that he has been injured; and . . . a plaintiff must know or reasonably should have known that his injury was proximately caused by conduct of the defendant." *Viock v. Stowe-Woodward Co.*, 13 Ohio App.3d 7, 12 (Erie County Ct. App. 1983). Cf. *Drake v. B. F. Goodrich Co., supra.* As the Ohio Supreme Court instructed, the discovery rule is a two-part rule requiring discovery both of a plaintiff's injury and of the cause thereof. *O'Stricker,* 4 Ohio St.3d at 90.

With respect to commencement of the running of applicable limitations periods, the relevant inquiry before this Court is not when did the plaintiffs actually learn that they had a cause of action against Honeywell, but rather when would a reasonable person have realized that the injuries suffered by plaintiffs might have been the result of wrongful or actionable conduct. See, e.g., *Curry,* 775 F.2d at 216. Having found that it is undisputed that plaintiffs knew of their injuries immediately after the subject explosion and that within six months of the date of said explosion plaintiffs discovered or were informed that the Honeywell gas control valve had caused the explosion, the Court holds that under the law of Ohio, plaintiffs' causes of action accrued and the statute of limitations with respect thereto as stated in OHIO REV. CODE §2305.10 commenced to run no later than six months after the December 12, 1975 gas explosion. *Id.* Cf. *Harper v. Eli Lilly and Co.*, 575 F. Supp. 1359, 1363 (N.D. Ohio 1983).

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5. The *O'Stricker* court stated, "we are instructed by the General Assembly which in its 1980 amendment adopted a 'discovery rule' defining a cause [of action] to arise at discovery of the injury and discovery of the cause thereof." *O'Stricker,* 4 Ohio St.3d at 90.

Upon consideration and in light of the nature of the December 12, 1975 gas explosion, of the nature and extent of William Copley's injuries, and of the acknowledged cognizance, within six months of the date of said explosion, by plaintiffs and by their investigator, William Bloom, of the fact that the Honeywell gas control valve failed to function properly, thereby allowing an accumulation of liquid propane gas which exploded upon activation by William Copley of the blower motor switch, the Court is of the opinion that it is inconceivable that a reasonable person would not have realized within the aforesaid six month period that the explosion was the source of plaintiffs' injuries and that the explosion was caused by the Honeywell gas control valve and, therefore, that plaintiffs' injuries might have been the result of actionable conduct on the part of Honeywell. See *Curry*, 775 F.2d at 216.

The doctrine of equitable estoppel is based upon the principle "that no man may take advantage of his own wrong." *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 232 (1959). See generally *McIntosh v. Micheli Restaurant, Inc.*, 22 Ohio Misc.2d 5 (Akron Mun. Ct. 1984). The Sixth Circuit has stated that "[i]f the defendant made a misrepresentation of material fact for the purpose of inducing a plaintiff to delay suit or release him from liability, . . . [plaintiff] is estopped to plead the statute of limitations or to interpose the release as a bar to suit, provided the plaintiff has acted in justifiable reliance upon the misrepresentation." *Ott v. Midland-Ross Corp.*, 600 F.2d 24, 31 (6th Cir. 1979). Estoppel is based upon the theory that where one, by his conduct, has induced another to change his position to his damage, disadvantage, or detriment, he is estopped from benefitting by such conduct. 42 O.Jur.3d, *Estoppel and Waiver* §31

(1983). In other words, a party must endure the consequences of his own acts which mislead another to act to their injury. *Id.* Estoppel must be certain and should not be based upon argument or inference or applied or extended by implication or intendment. A positive assertion of fact is generally necessary to create an equitable estoppel. 42 O.Jur.3d, *supra*, at §41. For the doctrine of equitable estoppel to apply, there must be a representation by words, acts, or silence of past or present fact, not opinion, which both communicates the fact or state of affairs in a misleading way and induces actual reliance in good faith and reasonable under the circumstances, causing the relying party to suffer prejudice or pecuniary disadvantage, if the party whose representation was relied upon were not estopped or precluded from asserting an otherwise valid right. *First Federal Savings & Loan Association of Toledo v. Perry's Landing, Inc.*, 11 Ohio App.3d 135, 145 (Wood County Ct. App. 1983). Cf. 34 O.Jur.2d, *supra*, §182 (2d ed. 1958). Moreover, a party asserting estoppel must be able to show that he had no knowledge or means of knowing the truth. Thus, as a general rule, it is essential to the application of the principles of equitable estoppel that the person claiming to have been detrimentally influenced by either the conduct or the declaration of another, "should have been destitute of knowledge of the facts. . . . Hence, there can be no estoppel where the party claiming it is chargeable with knowledge of the facts. . . ." 42 O. Jur.3d, *supra*, at §66.

To invoke the doctrine of equitable estoppel, it is necessary that a plaintiff reasonably rely on a defendant's conduct or representations in forbearing suit. *Curry*, 775 F.2d at 219, *quoting, Bomba v. W. L. Belvidere, Inc.*, 579 F.2d 1067, 1071 (7th Cir. 1978). As previously noted by this Court, plaintiffs could not reasonably have been mis-

led by Honeywell's fraudulent concealment, as alleged by plaintiffs, once they became aware of the relationship between the December 12, 1975 explosion, their injuries, and the Honeywell gas control valve. *Curry,* 775 F.2d at 219. Cf. *Allen v. A. H. Robbins Co.,* 752 F.2d 1365, 1374 n.6 (9th Cir. 1985). Knowledge of the precise nature of the valve's malfunction or defect is unimportant with respect to the Court's inquiry. That plaintiffs knew that they had been injured and that the Honeywell gas control valve may have been responsible for their injuries, the Court finds to be undisputed and dispositive. (W. Copley deposition, pp. 120, 184, 187; P. Copley deposition, pp. 8, 23-24; W. Bloom deposition, pp. 34-35, 79, 91, 94-95, 118).

The rule in the majority of jurisdictions is that a fraudulent concealment of a cause of action from the one in whom it resides, by the one against whom it lies, postpones the commencement of the running of the statute of limitations until discovery of the fact by the owner of the cause of action. 34 O.Jur.2d, *supra,* at §93. It is well established that the equitable tolling doctrine "is read into every federal statute of limitation." *Ott v. Midland-Ross Corp.,* 600 F.2d at 30, *quoting, Holmberg v. Armbrecht,* 327 U.S. 392, 397 (1946).

The Supreme Court of Minnesota has stated that the doctrine of fraudulent concealment is commonly applied in situations involving either the active or affirmative concealment of a defect or disadvantage, or the false denial of knowledge or information by one who is in possession of the facts, if the effect of such denial is to lead a plaintiff to believe that the facts do not exist or cannot be discovered. *DeCosse v. Armstrong Cork Co.,* 319 N.W.2d 45, 51 (Minn. Sup. Ct. 1982), *citing,* RESTATEMENT (SECOND) OF TORTS §550 comment b (1976). Under Minnesota law,

fraudulent concealment by a defendant may toll a statute of limitations period for two reasons:

> First, one who cannot assert his right because the necessary knowledge is improperly kept from him is not within the mischief the statute [of limitations] was intended to remedy. . . . Secondly, a person should not be permitted to shield himself behind the statute of limitations where his own fraud has placed him.

DeCosse, 319 N.W.2d at 50, *quoting*, *Schmucking v. Mayo*, 183 Minn. 37, 40-41, 235 N.W. 633, 634 (1931).

Plaintiffs allege, in essence, that Honeywell intentionally concealed from those in the vertical chain of distribution, users, and customers, known problems with its family of V8280 gas control valves, that by continuing to manufacture, sell, and distribute V8280 gas valves, Honeywell led those who were subsequently injured as a result of explosions caused by V8280 gas valves to believe said family of valves had no known defects, that Honeywell concealed known defects of its V8280 gas valve from the public through intentional "misstatements, misrepresentations and understatements," and that Honeywell intentionally failed to either inform or notify users of V8280 valves, of known defects thereof. In summary, plaintiffs allege, in essence, that Honeywell affirmatively engaged in an active effort at concealment and that absent such fraudulent concealment by Honeywell, plaintiffs would have commenced their actions against Honeywell within the applicable statute of limitations period because plaintiffs would have learned earlier than 1982 that the Honeywell V8280 family of gas control valves was defectively designed in that "the gas cock dial . . . [could] stick down in the 'on' position," thus allowing unburnt gas, upon pilot light outage, to continue to flow.

Fraudulent concealment must consist of affirmative acts or representations which are calculated to, and in fact do, prevent the discovery of the cause of action. Mere silence of the defendant and failure by the plaintiff to learn of the right of action, alone, are not sufficient. *Curry v. A. H. Robbins,* 775 F.2d at 218, *quoting, Zagar v. Health and Hospitals Governing Commission of Cook County,* 404 N.E.2d 496, 500 (1st Dist. Ct. App. Ill. 1980). Mere silence of the defendant and failure by plaintiff to learn of the precise cause are, alone, not sufficient to constitute fraudulent concealment which tolls the running of a statute of limitations. *Id.*

Minnesota courts have held that a defendant's fraudulent concealment tolls the statute of limitations because the "necessary knowledge" to assert a right of action has been withheld or concealed. *DeCosse,* 319 N.W.2d at 50-51; *Schmucking,* 235 N.W. at 633-34. Generally, the doctrine of fraudulent concealment is applicable primarily to cases where the facts surrounding the cause of a plaintiff's injury are susceptible of being concealed from a putative plaintiff. The cause *sub judice* is not such a case.

Notwithstanding Honeywell's fraudulent concealment of certain material facts regarding the V8280 family of gas control valves (admitted *arguendo* herein), the Court finds that the undisputed facts in this case establish that within the six-month time period immediately following the December 12, 1975 explosion, plaintiffs knew that they had been injured and they knew that the gas control valve manufactured by Honeywell had caused the explosion. In other words, the Court holds that the undisputed facts demonstrate that Honeywell's fraudulent concealment, admitted by Honeywell *arguendo* as alleged by plaintiffs, in no way prevented plaintiffs from recognizing that they were injured or from connecting their injuries to the

Honeywell gas control valve. Merely intoning the words "fraudulent concealment" is not sufficient by itself to avoid the statutes of limitations. *Independent Oil and Tire Co. v. Marathon Petroleum Co.*, 555 F. Supp. 633, 639 (N.D. Ohio 1982), *quoting, Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 574 (4th Cir. 1976).

It is the general rule that a statute of limitations commences to run at the time the cause of action accrues. See Annot., 32 A.L.R.4th 260, 266 (1984); 34 O.Jur.2d, *supra*, at §§56, 81. Accordingly, the Court holds that plaintiffs' causes of action and claims against Honeywell arising out of the December 12, 1975 explosion, accrued no later than six months immediately following said explosion.

The undisputed facts demonstrate that within six months of the date of the explosion plaintiffs were informed that the Honeywell gas control valve had failed to shut off the flow of liquid propane gas into plaintiffs' home upon outage of their furnace pilot light. That plaintiffs were not then also cognizant either of the exact mechanics of the valve malfunction or of any one design defect of the subject gas valve or family of such valves, the Court holds, given the specific undisputed facts of this case, to be insufficient to toll the running of applicable statutes of limitations. It is clear that mere ignorance of their rights on the part of plaintiffs is not sufficient to overcome the limitations defense. *Dayco Corp. v. Firestone Tire & Rubber Co.*, 386 F. Supp. 546, 549 (N.D. Ohio 1974), *aff'd*, 523 F.2d 389 (6th Cir. 1975), and *citing, Akron Presform Mold Co. v. McNeil Corp.*, 496 F.2d 230, 234 (6th Cir. 1974). See also *Ashland Oil Co. of California v. Union Oil Co. of California*, 567 F.2d 984, 988 (Temp. Emer. Ct. App. 1977), *cert. denied*, 435

U.S. 994 (1978), and *citing, Wood v. Carpenter,* 101 U.S. 135, 143 (1879).

Plaintiffs actions against Honeywell were commenced on September 7 and 9, 1982, respectively, that is, approximately six years and nine months after the December 12, 1975 explosion. Therefore, with respect to the statute of limitations issue, whether the Court applies Ohio law or Minnesota law to plaintiffs' instant action against Honeywell, it is clear that plaintiffs commenced their actions against Honeywell subsequent to the time that any applicable statute of limitations period had already elapsed. The Court holds that defendant Honeywell is not estopped to assert its statute of limitations defense. Therefore, the Court concludes that plaintiffs' causes of action against Honeywell arising out of the December 12, 1975 gas explosion and which are the subject of this lawsuit were time-barred by applicable statutes of limitations no later than June, 1982. Accordingly, plaintiffs' actions against Honeywell were not timely commenced, and given the state of plaintiffs' knowledge, neither Ohio's discovery rule nor Minnesota's doctrine of fraudulent concealment nor the doctrine of equitable tolling tolls the running of the statutes of limitations applicable to plaintiffs' causes of action against Honeywell.

Upon a review of Honeywell's action against third-party defendants Sears, Phillip's Bottled Gas Co. and Frey & Sons, the Court finds that Honeywell's third-party action seeks indemnification by or contribution from the aforesaid third-party defendants, in the event Honeywell is held liable to plaintiffs. Therefore, upon consideration and having found, in essence, that Honeywell is not liable to plaintiffs, the Court will dismiss Honeywell's third-party action as being moot.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that plaintiffs' motion for leave to file instanter a reply to separate answers of Honeywell be, and it hereby is, GRANTED; and it is

FURTHER ORDERED that defendant Honeywell's motion for summary judgment be, and it hereby is, GRANTED; and it is

FURTHER ORDERED that defendant Honeywell's third-party complaint against Sears, Phillip's Bottled Gas Co. and Frey & Sons be, and it hereby is, DISMISSED; and it is

FURTHER ORDERED that the motions of defendant Sears to stay discovery and to dismiss be, and the same hereby are, DENIED as moot; and it is

FURTHER ORDERED that plaintiffs' complaint be, and it hereby is, DISMISSED with prejudice.

/s/ JOHN W. POTTER
United States District Judge

Supreme Court, U.S.
FILED
SEP 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-171

IN THE

Supreme Court of the United States

October Term, 1987

WILLIAM COPLEY, et al.,

Petitioners,

vs.

HEIL-QUAKER CORP., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT HONEYWELL, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SCOTT W. JOHNSON
Counsel of Record
STEVE GASKINS
FAEGRE & BENSON
2300 Multifoods Tower
33 South Sixth Street
Minneapolis, MN 55402
Telephone: (612) 371-5300
Attorneys for Respondent Honeywell, Inc.

224-7631 — Review Publishing Co., 287 E. 6th St., Paul, Minn. 55101 — 224-7631

QUESTION PRESENTED

Section 23(a) of the Consumer Product Safety Act, 15 U.S.C. Section 2072(a), allows private causes of action for violation of certain rules and orders issued by the Consumer Product Safety Commission. The question presented here is whether the court below correctly decided that plaintiffs cannot assert a private cause of action for personal injuries under Section 23(a) based on defendant's alleged "violation" of guidelines issued by the Commission to interpret the reporting requirements of Section 15(b) of the Act, 15 U.S.C. Section 2064(b).

PARTIES

Petitioners are William Copley, Patsy Copley, and Dale Copley.

Respondent is Honeywell, Inc. Honeywell, Inc. has no parent companies, subsidiaries or affiliates.

Other parties below were Heil-Quaker Corporation, Sears, Roebuck & Company, Frey & Sons, and Phillips Bottled Gas Company.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The unpublished *per curiam* opinion of the Court of Appeals for the Sixth Circuit is reprinted in the Petition Appendix at A1 (PA1). The District Court's unpublished Opinion and Order dated March 25, 1986, dismissing the claim against Honeywell is reprinted in the Petition Appendix at A5 (PA5). The District Court's Opinion and Order dated March 6, 1984, dismissing all defendants except Honeywell is reprinted in Respondent's Appendix at A1 (RA1).

I. JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit that is the basis for the Petition was filed May 20, 1987. Plaintiffs' Petition was filed within ninety days of the decision of the Court of Appeals. This Court has jurisdiction under 28 U.S.C. § 1254(1).

II. STATUTES AND REGULATIONS INVOLVED

Sections 15(b) and 23(a) of the Consumer Product Safety Act, 15 U.S.C. §§ 2064(b) and 2072(a) (1982), are reprinted in Respondent's Appendix at (RA16-21). The substantial product hazard reporting regulations involved, 16 C.F.R. Part 1115 (1985), were promulgated at 43 Fed. Reg. 34,988 (August 7, 1978) and are reproduced in pertinent part in Respondent's Appendix (RA22-45).

III. STATEMENT OF THE CASE

This action arose as a result of injuries sustained by William Copley in a furnace accident on December 12, 1975, in Lindsey, Ohio. On that day, Mr. Copley awoke to a cold house. He went to the basement to check the furnace. He smelled liquified propane gas, saw the furnace pilot was out, and heard a hissing noise coming from the control valve. He turned the control valve off, and the hissing stopped. As he turned on the electric furnace blower switch to disperse the gas, a spark ignited the gas; and Mr. Copley was severely burned.

The next day William Bloom, a local plumber, investigated the scene. It was undisputed below that he tested the piping and, although he did not know what the precise problem was,

he concluded that the cause of the accident was a leak from a Honeywell V8280 control valve. It was undisputed below that Mr. Bloom later told Mrs. Copley that the valve had leaked, that he did not know the precise reason for the leak, but that he was sure that the valve was the cause of the accident. He also told her that he had kept the control valve in case she needed it. The Copleys never had the valve inspected and never communicated with Honeywell about the accident.

The District Court's Opinion

On September 7, 1982—six years and nine months after the accident—the Copleys filed an action alleging negligence and breach of warranty against Honeywell and Heil-Quaker in the United States District Court for the District of Minnesota; and the next day, September 8, 1982, they amended their pending complaint in Ohio adding Honeywell as a party and also adding an additional cause of action for violation of Section 23(a) of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2072(a) (1982).

On August 7, 1983, the Minnesota case was transferred to Ohio, and the cases were consolidated. On March 25, 1986, the Honorable John W. Potter granted summary judgment dismissing not only the Copleys' common law claims but also their CPSA claim against Honeywell on the ground that they were barred by all applicable statutes of limitation.[1] As Judge

[1] Judge Potter had previously granted summary judgment to the other defendants, including Heil-Quaker, because the statute of limitation had run; but he held the claims against Honeywell in abeyance until after discovery was completed on the issue of whether the statute had been tolled by Honeywell's alleged fraudulent concealment. *Copley v. Heil-Quaker Corp., et al.*, No. C82-512, Memorandum and Order (March 6, 1986), (RA14-15). The decision dismissing Heil-Quaker is on appeal to this Court, *Copley v. Heil-Quaker Corp., et al.* (No. 87-170, 1987 Term).

Potter noted, the applicable Ohio limitation period for actions to recover damages for personal injury was two years. *Copley v. Heil-Quaker Corp., et al.*, Civ. No. C82-512, Memorandum and Order at 8 (March 25, 1986) (PA17). The applicable Minnesota limitation periods were four years for warranty actions and six years for negligence actions. *Id.* at 8-9; (PA17). The Copleys sought to avoid the application of the statutes of limitation with two arguments: 1) That Honeywell had fraudulently concealed a defect in its V8280 gas control valve and that the statutes of limitation should, therefore, be tolled under Ohio's "discovery" rule or Minnesota's fraudulent concealment tolling doctrine; and 2) That their cause of action under the CPSA was a fraud action—not a personal injury action—and that the limitation period, therefore, was tolled until they discovered that Honeywell had not complied with the Consumer Product Safety Commission's ("CPSC" or "Commission") substantial hazard reporting regulations, 16 C.F.R. Part 1115 (1985) (RA25).

Judge Potter rejected both arguments. With respect to the state law claims, he noted that it was undisputed that Mr. Copley's injury was immediately apparent at the time of the accident and that no later than six months thereafter the Copleys were aware that the Honeywell control valve had leaked gas and caused the accident. Judge Potter held that once the Copleys could connect their injuries to the source of those injuries, the statutes of limitation in both Ohio and Minnesota began to run, and that alleged fraudulent concealment of the particulars of a defect was irrelevant. Therefore, Judge Potter held the state law claims were time-barred.

With respect to the CPSA claim, Judge Potter held that the Copleys' allegations properly stated a claim under the Consumer Product Safety Act, but ruled that it, too, was time-

barred. Since there was no limitation period set forth in the Act, he applied the most closely analogous state statute. He ruled that under Ohio law, the complaint was one to recover for personal injuries and, hence, was governed by the Ohio limitation statute requiring the case to be brought within two years of the accident. Accordingly, Judge Potter held that the Copleys' claim under the Consumer Product Safety Act had been filed too late.

The Opinion of the Court of Appeals

On May 20, 1987, the Sixth Circuit Court of Appeals, in an opinion not recommended for publication, affirmed Judge Potter *per curiam*. The opinion affirms Judge Potter's holding that in a personal injury action concealment of a specific defect is irrelevant and that statutes of limitation are not tolled once plaintiffs are aware of their injuries and of the source of their injuries. With respect to plaintiffs' Consumer Product Safety Act claim, however, the Sixth Circuit did not reach the limitation issue. Instead, the Sixth Circuit, without discussion, held that no cause of action under Section 23(a) of the Act could be stated for alleged noncompliance with the interpretive reporting regulations issued by the Consumer Product Safety Commission. The Court held that the issue was governed by the principles enunciated in the only other federal court of appeals' decision on the subject, *Drake v. Honeywell, Inc.*, 797 F.2d 603 (8th Cir. 1986), reprinted in Respondent's Appendix at (RA46).

On July 29, 1987, plaintiffs filed their petition for review by this Court.

Summary of Argument

Certiorari should not be granted. A decision by this Court on the issue presented will have no effect on plaintiffs since the issue is presented in the context of a statute of limitation dispute, and the Ohio statute of limitation bars plaintiffs' action in any event.

The question presented, moreover, is not appropriate for the exercise of this Court's jurisdiction at this time. Only two federal courts of appeals have addressed the issue, and both correctly decided that no private action could be stated for violation of the CPSC's reporting guidelines. Judge Gibson's analysis in *Drake v. Honeywell, Inc.*, 797 F.2d 603 (8th Cir. 1986) (RA46) is strong, and its weight may very well lead to a uniform application of federal law. The Minnesota Supreme Court had, prior to *Drake*, issued a contrary opinion on the issue; nevertheless, awaiting decision by more federal courts of appeals may resolve the apparent conflict without the intervention of this Court.

Reasons for Denying the Writ

I. Plaintiffs' Action In This Case Is Barred By The Ohio Statute Of Limitation No Matter How This Court Decides The Issue Presented.

The Copleys began their action to recover damages for their personal injuries more than six years after this accident. The Consumer Product Safety Act contains no statute of limitation. Accordingly, in deciding whether the Copleys had commenced their alleged cause of action under Section 23(a) of the CPSA in timely fashion, Judge Potter rightly applied the most closely analogous statute of limitation under Ohio law, the law of the forum. *DelCostello v. International Brother-*

hood of Teamsters, 462 U.S. 151, 158 (1983). Judge Potter found that the most analogous Ohio limitation statute was that governing actions to recover damages for personal injuries, Ohio Rev. Code § 2305.10. That statute provides a two-year statute of limitation; and Judge Potter, after examining all tolling issues, held that plaintiffs' action, begun more than six years after the accident, was barred.

The Sixth Circuit did not reach the statute of limitation issue since it found the CPSA did not provide a private cause of action for noncompliance with the Commission's Section 15(b) reporting regulations. *Copley v. Heil-Quaker Corp., et al.*, No. 86-3360, at 3 (6th Cir. 1987) (PA5). However, both this Court and the Sixth Circuit defer to district court judges' interpretations of state law in their jurisdictions. *Runyon v. McCrary*, 427 U.S. 160 (1976) (deference given to district court's interpretation of most analogous state statute of limitation for Section 1981 claim); *Diminnie v. U.S.*, 728 F.2d 301, 306 (6th Cir. 1984), *cert. denied*, 469 U.S. 842 (1985) (deference given to district court's interpretation of Michgan malicious prosecution law); *Bagwell v. Canal Insurance Co.*, 663 F.2d 710, 712 (6th Cir. 1981) (deference given to district court's interpretation of state insurance law relating to misrepresentations made in applications for insurance); *Randolph v. New England Mutual Life Insurance Co.*, 526 F.2d 1383, 1385 (6th Cir. 1975) (deference given to district court's interpretation of state law regarding termination provisions in contracts). In this case, the issue of state law was decided in Judge Potter's Memorandum Opinion. Judge Potter, after mistakenly finding a valid CPSA cause of action, was required to interpret state law and decide which Ohio statute of limitation was analogous to the CPSA cause of action. He held that the plaintiffs' CPSA cause of action was barred by Ohio's two-year personal injury statute of limitation (PA16-

17). Hence, even if a valid federal cause of action exists, the statute of limitation bars the plaintiffs' claim in this case.

II. The Issue Is Not Ripe For Decision By This Court At This Time.

Both court of appeals' cases on the issue of whether a private cause of action under Section 23(a) of the CPSA can be predicated on alleged violation of the CPSC's reporting guidelines were decided recently, and both cases were decided after the Minnesota Supreme Court's decision to the contrary in *Swenson v. Emerson Electric Co.*, 374 N.W.2d 690 (Minn. 1985), *cert. denied*, 106 S. Ct. 1998 (1986).

Until July 23, 1986, no United States Court of Appeals had addressed the issue whether a private cause of action could be stated for violation of the CPSC's reporting guidelines. At that time, the lower federal courts were split on the question of whether alleged violation of the reporting guidelines would support a private cause of action. Four district courts held that a private cause of action could be stated,[2] and two held that no such cause of action existed.[3] When confronted with the issue in 1985, the Minnesota Supreme Court allowed a private cause of action for violation of the interpretive reporting regulations to proceed to trial in the state courts. *Swenson v. Emerson Electric Co.*, 374 N.W.2d 690 (Minn. 1985), *cert. denied*, 106 S. Ct. 1998 (1986). At that time, however, no federal circuit court had spoken.

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[2] *Wilson v. Robertshaw Controls Co.*, 600 F. Supp. 671, 675 (N.D. Ind. 1985); *Payne v. A. O. Smith Corp.*, 578 F. Supp. 733, 738 (S.D. Ohio 1983); *Young v. Robertshaw Controls Co.*, 560 F. Supp. 288, 292-93 (N.D.N.Y. 1983); *Butcher v. Robertshaw Controls Co.*, 550 F. Supp. 692, 698-99 (D. Md. 1981).

[3] *Morris v. Coleco Industries*, 587 F. Supp. 8, 10 (E.D. Va. 1984); *Kahn v. Sears, Roebuck & Co.*, 607 F. Supp. 957 (N.D. Ga. 1985).

On July 23, 1986, the United States Court of Appeals for the Eighth Circuit issued *Drake v. Honeywell, Inc.*, 797 F.2d 603 (8th Cir. 1986). In a clear, thorough opinion, Judge Gibson analyzed the issues involved and concluded that there was no private cause of action for violation of the CPSC's reporting regulations.

In *Drake*, Judge Gibson correctly reasoned that the structure of the Act, together with fundamental principles of administrative law, supports the conclusion that Congress did not intend to create a private cause of action for alleged noncompliance with the Commission's reporting regulations. Section 23(a), which creates a private cause of action under the CPSA, limits the private action to violations of rules and orders issued by the CPSC. 15 U.S.C. § 2072(a) (1982). The CPSA is unique because it does not create private causes of action for violations of the Act's statutory provisions themselves, but instead limits private causes of action to actions predicated upon the alleged violation of a rule or order issued by the CPSC.

Plaintiffs argue that the CPSC's reporting guidelines will support a private cause of action under Section 23(a). They are wrong. The interpretive guidelines promulgated by the Commission at 16 C.F.R. Part 1115 (1985) are not rules that can be "violated" within the meaning of Section 23(a), and thus do not support a private cause of action.

An administrative agency's power to promulgate substantive rules having the force and effect of law is limited to occasions where Congress has expressly delegated its lawmaking power to that agency. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940). Rules promulgated without any express delegated authority are interpretations that provide guidance to the parties and courts regarding the intent of the underlying

statute, but they are not independently enforceable by law. *See General Electric v. Gilbert,* 429 U.S. 125 (1976); *Batterton v. Francis,* 432 U.S. 416 (1977). A legal action cannot be grounded on noncompliance with an interpretive rule; rather, it must be grounded on the underlying substantive statute. *See, e.g., Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944); *Fmali Herb, Inc. v. Heckler,* 715 F.2d 1385 (9th Cir. 1983).

The Consumer Product Safety Act does not include general enabling language that allows the Commission to promulgate any rule that would effectuate the purposes of the Act. Rather, the Act authorizes the Commission to promulgate specific types of substantive rules. *See, e.g.,* 15 U.S.C. § 2056(a) (1982) (authority to issue product safety rules); 15 U.S.C. § 2057 (1982) (authority to issue rules banning hazardous products); 15 U.S.C. 2058(g)(2) (1982) (authority to promulgate rules regulating stockpiling of products); and 15 U.S.C. § 2063(b) (1982) (authority to promulgate rules to prescribe testing programs). Conspicuously absent is authority to promulgate substantive rules for the reporting regulations of Section 15(b) of the CPSA. If valid, the Commission's interpretive reporting regulations would constitute an authoritative interpretation of the underlying statute. Nevertheless, the reporting guidelines themselves lack the force and effect of law. Conduct departing from the CPSC's interpretative rule therefore "violates" only the underlying statutory provision Section 15(b). Section 23(a) does not authorize private causes of actions for violations of statutory provisions, and therefore the structure of the CPSA indicates that Congress did not intend to create a private cause of action for noncompliance with the CPSA's interpretive reporting regulations.

Moreover, even if the Commission did have statutory authority to promulgate substantive rules under Section 15(b),

administrative law recognizes that an agency's characterization of a rule as interpretive is entitled to great weight. *See Whirlpool Corp. v. Marshall,* 445 U.S. 1, 11 & n.15 (1980); *General Motors Corp. v. Rūckelshaus,* 742 F.2d 1561, 1565 (D.C. Cir. 1983), *cert. denied,* 471 U.S. 1074 (1985). The Commission expressly designated its reporting regulations, 16 C.F.R. Part 1115 (1985), as interpretive and emphasized that the provisions did not have the force and effect of law. 43 Fed. Reg. 34, 988; 34, 990 (Aug. 7, 1978). Consequently, attempting to assert a private cause of action for failure to follow the guidelines inevitably returns the plaintiffs to Section 15(b) of the statute, a provision whose violation will not support a private cause of action. Consequently, the structure of the Act and the fundamental administrative law principle that an interpretive rule is not capable of violation establish that no private right of action exists under Section 23(a) of the CPSA for noncompliance with the CPSC's interpretive reporting regulations.

This does not mean that the Act's reporting requirements are unenforceable. Under the CPSA's enforcement provisions, violations of the statutory requirements are enforceable by the CPSC and the Attorney General. 15 U.S.C. §§ 2069, 2070 and 2071 (1982).

Drake v. Honeywell, Inc., 979 F.2d 603 (8th Cir. 1986), recognized that the enforcement scheme of the Act allowed private actions in some cases and depended on administrative enforcement in others. The Eighth Circuit correctly concluded that noncompliance with the CPSC's reporting guidelines will not support a private cause of action. The Eighth Circuit's decision in *Drake* is the highest federal authority on an issue of federal statutory law. Accordingly, and despite the contrary decision of the Minnesota Supreme Court, it is very possible

that the *Drake* case will operate to secure uniform interpretation of the CPSA despite the previously existing contrary authority.

Indeed, the case at bar is a case in point. The Sixth Circuit held that there was no private cause of action under the CPSC's reporting rules in a single sentence, finding the issue ". . . to be controlled by the reasoning in *Drake v. Honeywell, Inc.* . . ." (PA4). Because only two federal courts of appeals have decided the issue, because the decisions of those courts are uniform, and because the only contrary authority from a state court of last resort is the Minnesota Supreme Court's in an opinion decided before the federal circuit court cases, this Court should exercise its discretion to decline review of the issue at this time.

CONCLUSION

Because the issue below was correctly decided consistent with a persuasive and authoritative case which may lead to uniformity in denying application of the CPSA's reporting regulations to private causes of action, and because the decision below is supportable on limitation grounds that bar the action in any event, the Copleys' petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

DATED: This 28th day of August, 1987.

Respectfully submitted,

SCOTT W. JOHNSON
Counsel of Record
STEVE GASKINS
FAEGRE & BENSON
2300 Multifoods Tower
33 South Sixth Street
Minneapolis, MN 55402
Telephone: (612) 371-5300
Attorneys for Respondent
Honeywell, Inc.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C 82-512

WILLIAM COPLEY, et al.,

Plaintiffs,

vs.

HEIL-QUAKER CORP., et al.,

Defendants.

MEMORANDUM AND ORDER

POTTER, J.:

This matter is before the Court on defendant Heil-Quaker Corporation's (hereinafter "Heil-Quaker") motion to dismiss and plaintiffs' opposition thereto, defendant Heil-Quaker's reply, plaintiffs' response, opposition of Bendix *amicus curiae* to defendant's motion to dismiss, reply by defendant Heil-Quaker, further opposition by Bendix, supplemental response of plaintiffs and defendant Heil-Quaker's supplemental response.

Subsequent to the filing of these motions, the Court has become aware of another case on its docket, William Copley, et al. v. Honeywell, Inc., et al., No. C 83-682. This case was transferred to this Court from the District of Minnesota, Fourth Division, pursuant to the provisions of 28 U.S.C. §1404(a). Plaintiffs have filed substantially the same claims with that Court as they filed in the case sub judice. Therefore, the Court will order that Case Nos. C 83-682 and C 82-512 be consolidated.

A hearing was held on defendant Heil-Quaker's motion for summary judgment on May 20, 1983. The issues herein were presented on the pleadings, memoranda, affidavits and oral arguments.

This action arises out of a gas explosion that occurred on December 12, 1975. Plaintiffs William Copley and Patsy Copley are husband and wife, and are the parents of plaintiff Dale Copley who was born on December 2, 1958. All three plaintiffs are residents and citizens of the State of Ohio.

The complaint herein was filed on August 24, 1982. As amended, it alleges that in 1967 plaintiffs William and Patsy Copley purchased a furnace manufactured by Heil-Quaker and installed it in their home. It further alleges that on December 12, 1975, serious injuries were inflicted upon the plaintiffs by a gas explosion allegedly caused by a malfunction of the furnace. The plaintiffs allege that Heil-Quaker manufactured the furnace and negligently incorporated a defective and malfunctioning control or valve which directly and proximately resulted in the injuries and damages sustained by the plaintiffs. The allegedly defective gas control or valve was manufactured by Honeywell, incorporated into the furnace manufactured by Heil-Quaker and sold to the plaintiffs by Sears.

Heil-Quaker is a Delaware corporation having its principal place of business in Tennessee and manufactures furnaces, central air conditioning equipment, heat pumps, and parts thereof. Its manufacturing operations are conducted only in the State of Tennessee, and the products it manufactures there are shipped for resale to purchasers located in every state of the United States, including Ohio. Heil-Quaker is licensed to do business and has appointed agents for service of process upon it only in Delaware and Tennessee.

No place of business, officer, managing agent or general agent of Heil-Quaker is located in the State of Ohio. From time to time, sales representatives of Heil-Quaker call on customers in Ohio to promote the sale of the company's products, sometimes taking orders subject to acceptance at the company's office in Tennessee. A service representative of Heil-Quaker also calls on customers in Ohio from time to time. Affidavit of Charles L. Shattuck.

Relief against Heil-Quaker is sought by the first, second, third and fourth causes of action which seek to recover for personal injuries to William and Dale Copley, their lost past and future earnings and medical expenses, Patsy Copley's loss of the consortium of her husband, and William and Patsy Copley's loss of services of Dale Copley.

All of the claims against Heil-Quaker seek recovery for bodily injury and its consequences and are, therefore, subject to O.R.C. §2305.10 which provides in pertinent part:

> An action for bodily injury . . . shall be brought within two years after the causes thereof arose.

The explosion which caused the bodily injuries occurred on December 12, 1975, and plaintiffs William and Patsy Copley therefore had two years to assert their claims against Heil-Quaker, until December 12, 1977. Since Dale Copley was born on December 2, 1958, he was seventeen years old and a minor on the date of the explosion. O.R.C. §2305.16 provides that, as to him, the two-year period of limitations would commence to run when his minority terminated. Thus his time to assert his claim against Heil-Quaker was two years from his eighteenth birthday. O.R.C. §3109.01. He became eighteen on December 2, 1976 and thus had until December 2, 1978 to assert his claims against Heil-Quaker.

Clearly, the plaintiffs' claims against Heil-Quaker were too late when this action was filed on August 24, 1982 and would

be barred without the effect of the Ohio savings clause, O.R.C. §2305.15. That section provides in pertinent part:

> When a cause of action accrues against a person, if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, inclusive, . . . does not begin to run until he comes into the state or while he is so absconded or concealed. . . .

This provision has been construed to toll limitations when the defendant, including a corporate defendant, is not amenable to personal service of process within the borders of the State of Ohio, even though continuously amenable to "long-arm" service outside the state. *Seeley v. Expert, Inc.*, 26 Ohio St.2d 61, 269 N.E.2d 121 (1971); *Ohio Brass Company v. Allied Products Corporation*, 339 F. Supp. 417 (N.D. Ohio 1972). Heil-Quaker argues that §2305.15, as construed in Ohio and as applied to a corporation in the position of Heil-Quaker violates the Due Process Clause of the Fourteenth Amendment and the Commerce Clause.[1]

Heil-Quaker asserts that §2305.15 violates the Due Process Clause because it conditions the benefit of the limitation period upon the appointment of an Ohio agent. Heil-Quaker asserts that the only way a foreign corporation can appoint an agent for service of process is to register to do business pursuant to O.R.C. §1703.04. Such registration to do business and appointment of an agent would subject it to suit in Ohio when there otherwise would not be the minimum contact required for suit in Ohio. Under the Due Process Clause and the "minimum contacts" rule of *International Shoe Co. v. Washington*, 326

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[1] The argument that the provisions of O.R.C. §2305.15 violate the Due Process Clause and the Commerce Clause of the United States Constitution were not considered by the Ohio Supreme Court in *Seeley*.

U.S. 310 (1945), Heil-Quaker further argues that §2305.15 violates the Due Process requirement of notice and fair warning because the contradictory nature of the Ohio laws, specifically §1703.02 and §2305.15, constitute a trap for unwary sellers.

Heil-Quaker also asserts that §2305.15 violates the Commerce Clause prohibition of discrimination against interstate firms solely because of the interstate nature of their businesses. Finally, Heil-Quaker argues that §2305.15 violates the Commerce Clause requirement that any burden imposed upon commerce be justified by a countervailing local interest.

The Court will first consider defendant Heil-Quaker's arguments regarding the Commerce Clause. The Supreme Court has applied two tests in analyzing whether a state statute violates the Commerce Clause. The Supreme Court has held that certain state statutes impose burdens on interstate commerce which are so substantial, direct and unjustified that the Supreme Court has held that the state statute is *per se* violative of the Commerce Clause. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *Allenberg Cotton Company v. Pittman*, 419 U.S. 20 (1974); *Pike v. Brice Church, Inc.*, 397 U.S. 137. 142 (1970). The second test is a balancing test. If a state statute regulates even handedly and imposes only incidental burdens on interstate commerce, the state statute may still be found to violate the Commerce Clause if the burden imposed on interstate commerce is clearly excessive when balanced against the benefit to the state of the statute. *Pike v. Brice Church, Inc., supra*, at 142. In applying the balancing test, the nature of the local interest and whether this interest can be promoted as well with a lesser impact on interstate commerce should be considered. *Pike v. Brice Church, Inc., supra*, at 142.

Two courts have recently considered statutes of other states which contain similar provisions as O.R.C. §2305.15 and have

found these provisions violated the Commerce Clause. In *Coons v. American Honda Motor Company, Inc.*, 94 N.J. 307, 463 A2d 921 (1983), the New Jersey Supreme Court held that New Jersey's tolling statute, *N.J.S.A.* 2A:14-22, was unconstitutional.

The issue in *Coons* arose when the United States Supreme Court, after initially agreeing to hear the appeal of one of the parties, remanded the case to the New Jersey court because of its decision in *G. D. Searle Co. v. Cohn*, 455 U.S. 404 (1982). In *Searle* the Supreme Court held that tolling provisions such as those contained in *N.J.S.A.* 2A:14-22 or O.R.C. §2305.15 do not violate the Equal Protection Clause. However, because of ambiguities in state law, the Supreme Court remanded the issue to state court for consideration of the issue of whether such provisions violate the Commerce Clause.

The New Jersey Supreme Court first held that neither the statutes nor the Court rules permit a corporation to appoint a representative to receive service of process without registering to do business in the state, and that any attempt to so file with the Secretary of State must be without effect. The Court then held that since the tolling statute mandates licensing in New Jersey in order to get its benefits the statute violates the Commerce Clause. In reaching this conclusion, the court relied on a series of Supreme Court decisions which have found a per se violation of the Commerce Clause where a state has discriminated against a foreign corporation engaged in interstate commerce merely because it has failed to do business in that state.

In a footnote the court in *Coons* indicates that even if it applied a balancing test, it would still find that the provisions of *N.J.S.A.* 2A:14-22 violate the Commerce Clause. According to the court, the burdens attached to the requirement of obtaining certification to register to do business to avoid the

tolling of the statute of limitations outweigh the benefits arising from the tolling provision.

The other court which has recently ruled upon this issue is the United States District Court for the District of Idaho in *Richard Dean McKinley v. Combustion Engineering, Inc., et al.*, Civil No. 80-4045, filed November 15, 1983. In *McKinley* the court had dismissed the plaintiff's wrongful death claims on the grounds they were barred by the statute of limitations. The dismissal was appealed to the Ninth Circuit. The Ninth Circuit, because of the Supreme Court's decision in *G. D. Searle & Co. v. Cohn, supra,* remanded the case to the district court for a decision on whether a former provision of Idaho Code 30-509 violated the Commerce Clause. The provisions of Idaho Code 30-509 were as follows:

> *Statute of limitations.*—Every such corporation which fails to comply with the provisions of this chapter shall be denied the benefit of the statutes of the state limiting the time for the commencement of civil actions, and any limitations in such statutes shall only run in favor of any such corporations during such time as such person duly designated, as foresaid, upon whom such service can be made, shall be within the state.

Subsequent to the filing of the lawsuit, this statute was repealed.

The court in *McKinley* first discussed the court's decision in *Coons*. The court in *McKinley* then examined Idaho law in order to determine the burden which the Idaho tolling statute placed upon foreign corporations. The court found that the tolling statute forced foreign corporations in Idaho to choose between either exposing itself to personal jurisdiction in the Idaho courts by complying with the tolling statute or being liable in perpetuity for all lawsuits filed against it under Idaho state law. The court in *McKinley* agreed with the court in *Coons*

that if a *per se* rule was employed the burden imposed by the tolling statutes on foreign corporations would violate the Commerce Clause. According to the court in *McKinley*, however, a *per se* rule was inapplicable because under existing Idaho case law the tolling statute could not be found to apply to firms engaged exclusively in interstate commerce.

The court in *McKinley* therefore utilized a balancing test and analyzed whether the burdens on interstate commerce imposed by the Idaho tolling statute outweigh the benefits of the statute. The court rejected the argument that no real burden was imposed upon a foreign corporation by forcing it to register in order to avoid forever being liable on state causes of action because a foreign corporation was already subject to personal jurisdiction under the Idaho long arm statute. According to the court in *McKinley*, the law on minimum contacts is not crystal clear. The standards which the courts have utilized in determining whether personal jurisdiction exists raise questions regarding "what constitutes substantial activities," "when will a single act be sufficient" and "what is reasonable." Therefore, foreign corporations doing business in Idaho may have an arguable defense based upon lack of personal jurisdiction. The provisions of Idaho Code 30-509 require a corporation to waive this defense and therefore impose a real burden upon foreign corporations which seek to avoid perpetual liability in Idaho.

The court in *McKinley* found that the benefit of requiring foreign corporations to appoint in-state representatives for service of process purposes is to make it easier for Idaho residents to effect service on a foreign corporation, resulting in a time and cost savings. According to the court in *McKinley*, this benefit, however, is outweighed by the burden of waiving a legal defense. A successful motion to dismiss for lack of personal jurisdiction can end possibly protracted litigation.

In addition, the court found that the benefits of the Idaho tolling statute could have been obtained through less onerous means. Corporations could have been required to file with the Secretary of State the location and address of its representative for service of process purposes.

The *McKinley* court therefore found:

> . . . that a statutory scheme that in essence requires foreign corporations to waive a legal defense places a serious burden on interstate commerce. These statutes do provide benefits to Idaho residents, but the same benefits could be realized through less onerous means. But even if less onerous means were not available, the Court would still find, for the reasons previously discussed, that the burdens placed on interstate commerce by the Idaho tolling statutes are clearly excessive when compared to the benefits obtained by those statutes.
>
> For all of the above reasons, the Court finds that Idaho Code 30-509 was unconstitutional under the Commerce Clause during the time that it was in effect prior to its repeal in 1979.

Richard Dean McKinley v. Combustion Engineering, Inc., supra at 13-14.

This Court agrees with the analysis of the *Coons* court and the court in *McKinley*. Regardless of whether the provisions of O.R.C. §2305.15 are analyzed under a *per se* test or a balancing test, this provision, as applied to defendant Heil-Quaker, violates the Commerce Clause. Under the *per se* test this provision violates the Commerce Clause by forcing interstate corporations to obtain a license in order to obtain the benefit of the statute of limitations defense. Under the balancing test, the burden of having to obtain a license and therefore waiving a possible defense of lack of personal jurisdiction outweighs the benefits to potential litigants of making service of process

easier to obtain on corporations engaged solely in interstate commerce. The Court therefore finds that the provisions of O.R.C. §2305.15 are unconstitutional, as applied to defendant Heil-Quaker, because they violate the Commerce Clause.

Plaintiffs have sought to distinguish the court's decision in *Coons* from the case sub judice on the grounds that New Jersey's statutory scheme is dissimilar to Ohio's. Plaintiffs have argued that Ohio's statutory scheme, unlike that of New Jersey, permits Ohio's Secretary of State to accept the appointment of a statutory agent for filing under the provisions of O.R.C. §111.6. This section provides in pertinent part as follows:

> The Secretary of State shall charge and collect, for the benefit of the state, the following fees:
>
> * * *
>
> (H) For filing any certificate or paper not required to be recorded, the sum of five dollars.

In support of this argument, plaintiffs have attached a letter written by Corporations Counsel for the Secretary of State of Ohio. This letter indicates in part:

> If, after thorough investigation into whether the foreign unlicensed corporation was doing business in Ohio, it is found that the corporation is truly interstate in nature, this office could accept the proposed designation of agent without requiring the foreign corporation to obtain a license.

The court in *Coons* was presented with a similar argument. While the Secretary of State had offered his opinion that no statutory procedure existed for a corporation engaged in interstate commerce to designate an agent without registering to do business in New Jersey, the Attorney General had given his opinion that *N.J.S.A.* 14A:1-6(4) constituted such a provision.

The provisions of *N.J.S.A.* 14A:1-6(4) provide in relevant part as follows:

> The Secretary of State shall record all documents, excepting annual reports, which relate to or in any way affect corporations, and which are required or permitted by law to be filed in his office."

The court held that foreign corporations would not be able to file notice with the Secretary under *N.J.S.A.* 14A:1-6(4) because "that statute directs the Secretary to record documents that are filed as required or permitted by law. It does not independently authorize the filing of any documents." *Coons, supra,* at 12-13.

Plaintiffs in the present action assert that Ohio's statutory scheme differs significantly from New Jersey's because Ohio's Secretary of State may accept an appointment of a statutory agent for filing pursuant to O.R.C. §111.16.

The Court finds no merit to plaintiffs' argument. The Court agrees with the New Jersey Court that the mere fact that the Secretary of State can accept a document for filing does not independently authorize the filing of such a document. Any scheme which would permit a corporation engaged solely in interstate commerce to designate an agent for service of process purposes should be enacted by the legislature. Therefore, the Court finds the opinion which plaintiffs obtained from Patricia Mill, Corporations Counsel for the Secretary of State, dated December 22, 1983, to be unpersuasive. As defendant Heil-Quaker points out, under existing Ohio law it is not practicable or realistic to speculate that a corporation engaged in interstate commerce might surmise that the Secretary of State after thorough investigation might accept the designation of an agent from a corporation which has not registered to do business in Ohio.

In addition, the Court notes that the Secretary of State's opinion on the issue of whether a corporation engaged in interstate commerce can appoint an agent has changed during the course of this litigation. Defendant Heil-Quaker filed its letter also from Patricia Mill, dated September 14, 1983, in which Ms. Mill indicated as follows:

> Pursuant to Section 1703.041 O.R.C., the Ohio Secretary of State may accept for filing a designation of statutory agent only for those foreign corporations which are duly licensed to transact business within the State. A designation of agent filed by a foreign corporation which is not licensed in Ohio would necessarily be rejected by this office due to the provisions of Section 1703.191 O.R.C.

In light of the Court's finding that the provisions of O.R.C. §2505.10 violate the Commerce Clause, the Court does not reach defendant Heil-Quaker's due process argument. The Court will grant Heil-Quaker's motion to dismiss.

There is also pending in this matter defendant Sears' motion for summary judgment, plaintiffs' opposition thereto, defendant Sears' reply and plaintiffs' response.

Defendant Sears has moved for summary judgment on the grounds that plaintiffs' claims against it are barred by the statute of limitations. According to defendant Sears, plaintiffs failed to bring their claims for bodily injury within the two year statute of limitations set forth in O.R.C. §2305.11. Defendant Sears successfully made this same argument in C 83-682 in the District Court in Minnesota. That court dismissed plaintiff's claims against defendant Sears on the grounds that those claims were barred by the applicable provision of the Minnesota statute of limitations.

The Court finds that no genuine issues of fact exist and defendant Sears is entitled to summary judgment as a matter of law on the grounds that plaintiffs' claims against it are

barred by the statute of limitations. The applicable statute of limitations is set forth in O.R.C. §2305.10 which provides in pertinent part as follows:

> An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

Plaintiffs are clearly seeking to bring an action for bodily injury and not breach of contract. See *Andrianos v. Community Traction Co.*, 155 Ohio St. 47, 97 N.E.2d 49 (1951). The Court rejects plaintiffs' argument that the applicable statute of limitations is set forth in O.R.C. §2305.07. Even if plaintiffs' arguments regarding the alleged disabilities of plaintiffs Dale and William Copley are accepted as true, plaintiffs failed to initiate their action within the two year period set forth in O.R.C. §2305.07.

The provisions of the Consumer Product Safety Commission Act, 15 U.S.C. §2072 et seq., do not establish plaintiffs' right to bring this action. Therefore, the Supreme Court's decision in *Bora v. Kerchelich*, 2 Ohio St.3d 146, 443 N.E. 2d 509 (1983), is inapplicable in the case sub judice.

In addition, as defendant Sears points out, it had no knowledge of the alleged defective nature of the valve manufactured by defendant Honeywell until after plaintiffs filed this action. Therefore, defendant Sears had no duty towards plaintiffs under the provisions of the CPSCA. The Court will grant defendant Sears' motion for summary judgment.

Finally, there is pending in this action defendant Honeywell's motion for summary judgment, plaintiffs' opposition thereto, defendant Honeywell's reply, and plaintiffs' response. Defendant Honeywell has also moved for summary judgment on the grounds that plaintiffs' claims against it are barred by the statute of limitations. Plaintiffs have alleged a private cause of action against defendant Honeywell under Section 23

of the Consumer Product Safety Act, 15 U.S.C. §2072. Plaintiffs, in the action they originally filed in Minnesota, alleged negligence, breach of express and implied warranties, and fraudulent concealment against defendant Honeywell. The court in Minnesota originally granted a motion for judgment on the pleadings filed by defendant Honeywell on the grounds that plaintiffs' claims against defendant Honeywell were barred by the statute of limitations. Plaintiffs then filed a motion for reconsideration in which they argued that the statute of limitations had been tolled by defendant Honeywell's fraudulent concealment of certain relevant facts. The District Court in Minnesota vacated its dismissal of plaintiffs' action against defendant Honeywell on the grounds that plaintiffs' case against defendant Honeywell should not be dismissed at the pleading stage and plaintiffs should be given an opportunity to develop it further. Defendant Honeywell then argued that plaintiffs' action should be dismissed on the grounds that plaintiffs, by filing two actions, had split their claims between this Court and the District Court in Minnesota. The District Court in Minnesota denied defendant Honeywell's motion to dismiss and ordered the case transferred to this Court pursuant to the provisions of 28 U.S.C. §1404(a).

For the reasons previously stated in reference to defendant Sears' motion, the Court finds merit to defendant Honeywell's argument that the statute of limitations governing plaintiffs' claims is set forth in O.R.C. §2305.10 and that any tolling provisions set forth in O.R.C. §2305.16 are inapplicable in the case sub judice.

The Court, however, agrees with the Minnesota Court that it would be inappropriate at this stage of the proceedings to grant defendant Honeywell's motion for summary judgment

because genuine issues of fact exist on the issue of whether defendant Honeywell fraudulently concealed from plaintiffs its alleged wrongful conduct.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that Case No. C 83-682 and the above captioned case be, and hereby are, consolidated; and it is

FURTHER ORDERED that defendant Heil-Quaker's motion for summary judgment be, and hereby is, GRANTED; and it is

FURTHER ORDERED that defendant Sears, Roebuck & Company's motion for summary judgment be, and hereby is, GRANTED; and it is

FURTHER ORDERED that defendant Honeywell, Inc.'s motion for judgment on the pleadings or, in the alternative, summary judgment be, and hereby is, DENIED; and it is

FURTHER ORDERED that this cause be, and hereby is, set for pretrial on March 19, 1984 at 11:00 a.m.

JOHN W. POTTER
United States District Judge

Sections 15(b) and 23(a) of the Consumer Product Safety Act

15 U.S.C. § 2064:

§ 2064. Substantial product hazards

(a) Definition. For purposes of this section, the term "substantial product hazard" means—

(1) a failure to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public, or

(2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.

(b) Noncompliance with applicable consumer product safety rules; product defects; notice to Commission by manufacturer, distributor, or retailer. Every manufacturer of a consumer product distributed in commerce, and every distributor and retailer of such product, who obtains information which reasonably supports the conclusion that such product—

(1) fails to comply with an applicable consumer product safety rule; or

(2) contains a defect which could create a substantial product hazard described in subsection (a)(2).

shall immediately inform the Commission of such failure to comply or of such defect, unless such manufacturer, distributor, or retailer has actual knowledge that the Commission has been adequately informed of such defect or failure to comply.

(c) Public notice of defect or failure to comply; mail notice. If the Commission determines (after affording interested persons, including consumers and consumer organizations, an opportunity for a hearing in accordance with subsection (f) of this section) that a product distributed in commerce

presents a substantial product hazard and that notification is required in order to adequately protect the public from such substantial product hazard, the Commission may order the manufacturer or any distributor or retailer of the product to take any one or more of the following actions:

(1) To give public notice of the defect or failure to comply.

(2) To mail notice to each person who is a manufacturer, distributor, or retailer of such product.

(3) To mail notice to every person to whom the person required to give notice knows such product was delivered or sold.

Any such order shall specify the form and content of any notice required to be given under such order.

(d) Repair; replacement; refunds; action plan. If the Commission determines (after affording interested parties, including consumers and consumer organizations, an opportunity for a hearing in accordance with subsection (f)) that a product distributed in commerce presents a substantial product hazard and that action under this subsection is in the public interest, it may order the manufacturer or any distributor or retailer of such product to take whichever of the following actions the person to whom the order is directed elects:

(1) To bring such product into conformity with the requirements of the applicable consumer product safety rule or to repair the defect in such product.

(2) To replace such product with a like or equivalent product which complies with the applicable consumer product safety rule or which does not contain the defect.

(3) To refund the purchase price of such product (less a reasonable allowance for use, if such product has been in the possession of a consumer for one year or

more (A) at the time of public notice under subsection (c), or (B) at the time the consumer receives actual notice of the defect or noncompliance, whichever first occurs).

An order under this subsection may also require the person to whom it applies to submit a plan, satisfactory to the Commission, for taking action under whichever of the preceding paragraphs of this subsection under which such person has elected to act. The Commission shall specify in the order the persons to whom refunds must be made if the person to whom the order is directed elects to take the action described in paragraph (3). If an order under this subsection is directed to more than one person, the Commission shall specify which person has the election under this subsection. An order under this subsection may prohibit the person to whom it applies from manufacturing for sale, offering for sale, distributing in commerce, or importing into the customs territory of the United States (as defined in general headnote 2 to the Tariff Schedules of the United States [19 USCS § 1202]), or from doing any combination of such actions, the product with respect to which the order was issued.

(e) Reimbursement. (1) No charge shall be made to any person (other than a manufacturer, distributor, or retailer) who avails himself of any remedy provided under an order issued under subsection (d), and the person subject to the order shall reimburse each person (other than a manufacturer, distributor, or retailer) who is entitled to such a remedy for any reasonable and foreseeable expenses incurred by such person in availing himself of such remedy.

(2) An order issued under subsection (c) or (d) with respect to a product may require any person who is a manufacturer, distributor, or retailer of the product to reimburse any

other person who is a manufacturer, distributor, or retailer of such product for such other person's expenses in connection with carrying out the order, if the Commission determines such reimbursement to be in the public interest.

(f) Hearing. An order under subsection (c) or (d) may be issued only after an opportunity for a hearing in accordance with section 554 of title 5, United States Code [5 USCS § 554], except that, if the Commission determines that any person who wishes to participate in such hearing is a part of a class of participants who share an identity of interest, the Commission may limit such person's participation in such hearing to participation through a single representative designated by such class (or by the Commission if such class fails to designate such a representative).

(g) Preliminary injunction. (1) If the Commission has initiated a proceeding under this section for the issuance of an order under subsection (d) with respect to a product which the Commission has reason to believe presents a substantial product hazard, the Commission (without regard to section 27(b)(7) [15 USCS § 2076(b)(7)]) or the Attorney General may, in accordance with section 12(c)(1) [15 USCS § 2061 (c)(1)], apply to a district court of the United States for the issuance of a preliminary injunction to restrain the distribution in commerce of such product pending the completion of such proceeding. If such a preliminary injunction has been issued, the Commission (or the Attorney General if the preliminary injunction was issued upon an application of the Attorney General) may apply to the issuing court for extensions of such preliminary injunction.

(2) Any preliminary injunction, and any extension of a preliminary injunction, issued under this subsection with respect to a product shall be in effect for such period as the

issuing court prescribes not to exceed a period which extends beyond the thirtieth day from the date of the issuance of the preliminary injunction (or, in the case of a preliminary injunction which has been extended, the date of its extension) or the date of the completion or termination of the proceeding under this section respecting such product, whichever date occurs first.

(3) The amount in controversy requirement of section 1331 of title 28, United States Code [28 USCS § 1331], does not apply with respect to the jurisdiction of a district court of the United States to issue or exend [extend] a preliminary injunction under this subsection.

(Oct. 27, 1972, P. L. 92-573, § 15, 86 Stat. 1221; May 11, 1976, P. L. 94-284, § 12(a), 90 Stat. 508; Aug. 13, 1981, P. L. 97-35, Title XII, Subtitle A, § 1211(h)(4), 95 Stat. 723.)

15 U.S.C. § 2072:

§ 2072. Suits for damages

(a) Persons injured; costs; amount in controversy. Any person who shall sustain injury by reason of any knowing (including willful) violation of a consumer product safety rule, or any other rule or order issued by the Commission may sue any person who knowingly (including willfully) violated any such rule or order in any district court of the United States in the district in which the defendant resides or is found or has an agent, shall recover damages sustained, and may, if the court determines it to be in the interest of justice, recover the costs of suit, including reasonable attorneys' fees (determined in accordance with section 11(f) [15 USCS § 2060(f)]) and reasonable expert witnesses' fees; Provided, That the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, unless such action is brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Denial and imposition of costs. Except when express provision is made in a statute of the United States, in any case in which the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) Remedies available. The remedies provided for in this section shall be in addition to and not in lieu of any other remedies provided by common law or under Federal or State law.

(Oct. 27, 1972, P. L. 92-573, § 23, 86 Stat. 1226; May 11, 1976, P. L. 94-284, § 10(c), 90 Stat. 507; Dec. 1, 1980, P.L. 96-486, § 3, 94 Stat. 2369; Aug. 13, 1981, P. L. 97-35, Title XII, § 1211(h)(3)(B), 95 Stat. 723.)

Title 16—Commercial Practice
CHAPTER II—CONSUMER PRODUCT SAFETY COMMISSION
SUBCHAPTER B—CONSUMER PRODUCT SAFETY ACT REGULATIONS
PART 1115—SUBSTANTIAL PRODUCT HAZARD REPORTS

* * *

Interpretation, Policy, and Procedure for Substantial Product Hazards

AGENCY: Consumer Product Safety Commission.

ACTION: Statement of interpretation, policy, and procedure.

SUMMARY: In this document the Consumer Product Safety Commission sets forth its interpretation of the reporting requirement in section 15(b) of the Consumer Product Safety Act. Section 15(b) requires every manufacturer, distributor, and retailer of a consumer product who obtains information which reasonably supports the conclusion that the product either fails to comply with an applicable consumer product safety rule or contains a defect which could create a substantial product hazard immediately to inform the Commission, unless the manufacturer, distributor, or retailer has actual knowledge that the Commission is adequately informed of such failure to conform or of such defect. The Commission has also outlined its policy and procedure regarding remedial action and sanctions relating to the treatment of substantial product hazards and reports under section 15.

This regulation replaces and consolidates the Commission's existing policies and procedures for substantial product hazards. The purpose of this rule is to assist those subject to section 15(b) by clearly setting forth the Commission's interpretation, policy, and procedure regarding that section and by informing them of possible remedies and sanctions.

EFFECTIVE DATE: August 7, 1978.

FOR FURTHER INFORMATION CONTACT:

Eric L. Stone, Product Defect Correction Division, Compliance and Enforcement, Consumer Product Safety Commission, 5401 Westbard Avenue, Washington, D.C. 20207, telephone 301-492-6608.

* * *

DISCUSSION OF COMMENTS

* * *

D. SUBSTANTIVE OR INTERPRETIVE RULE

1. The written comments in response to the September publication of proposed Part 1115 indicated that the proposed rule was confusing as to its intended effect. The stated purpose of the rule is to "interpret" section 15 of the CPSA and to set forth the Commission's policy and procedure in enforcing this interpretation. Yet, as the commenters pointed out, the rule also stated that remedial actions would be taken and sanctions sought for violations "of this Part." These commenters said that such comments indicated that the rule was substantive in effect.

The confusion in the proposed rule has been eliminated. The Commission considered the difference between promulgating the rule as substantive or interpretive, sought public comment on the issue at the public hearings in April and May of 1978, and has decided to promulgate the rule as interpretive.

A substantive rule has the force and effect of law. Thus, a violation of a substantive rule issued under the CPSA is equivalent to a violation of the CPSA. In contrast, an interpretive rule offers guidance as to what a law means, but does not itself have the force and effect of law. A violation of an interpretive rule is not necessarily a violation of law; the failure to comply with an interpretive rule *is* a violation of the law under which it is issued only if the rule reasonably interprets

that law. In issuing these rules under section 15 of the CPSA, the Commission believes it has reasonably interpreted the provisions and obligations of that section. However, a firm charged with violating section 15 through acts which are contrary to these rules will always have an opportunity to urge the reasonableness of its actions under the circumstances, thereby defeating the accusation.

The Commission agrees with the consumer commenters who stated that the Commission could address the issues of its authority and the desirability of issuing a substantive regulation at a later date. They indicated that an interpretive regulation will serve a dual purpose: It will put subject firms fairly on notice of the Commission's view of the law, and it will give the Commission an opportunity to assess the reasonableness and effectiveness of this rule. The Commission agrees and is, therefore, issuing this rule as an interpretation of section 15.

2. Several commenters were unsure as to when civil and/or criminal penalties might be or could be assessed for failure to comply with section 15(b) of the CPSA.

Section 20 of the CPSA allows the Commission to obtain civil penalties against any person who knowingly fails to furnish information required by section 15(b) or who knowingly fails to comply with an order issued under section 15(c) or (d). Section 21 of the CPSA allows the Commission to obtain criminal penalties against any person who knowingly and willfully violates section 15 (b), (c), or (d) after having recieved [sic] notice of noncompliance from the Commission. The Commission's interpretation of section 15, embodied in this rule, will guide it in determining which actions to pursue and sanctions to seek as well as which persons to name as defendants. This interpretive rule should also guide subject firms and their officers in discharging their responsibilities under section 15.

PART 1115—SUBSTANTIAL PRODUCT HAZARD REPORTS

Subpart A—General Interpretation

Sec.

1115.1 Purpose.
1115.2 Scope and finding.
1115.3 Definitions.
1115.4 Defect.
1115.5—1115.9 [Reserved]
1115.10 Persons who must report and where to report.
1115.11 Imputed knowledge.
1115.12 Information which should be reported; evaluating substantial product hazard.
1115.13 Content and form of reports; delegations of authority.
1115.14 Time computations.
1115.15 Confidentiality and disclosure of data.

Subpart B—Remedial Actions and Sanctions

1115.20 Voluntary remedial actions.
1115.21 Compulsory remedial actions.
1115.22 Prohibited acts and sanctions.

Authority: Secs. 12, 15, 16, 17(a), 19, 20, 21, 22, 24, 27, 30 of Pub. L. 92-573, as amended by Pub. L. 94-284; 86 Stat. 1218, 1221-1227, 1231, as amended, 90 Stat. 508-510 (15 U.S.C. 2061, 2064, 2065, 2066(a), 2068, 2069, 2070, 2071, 2073, 2076, 2079), unless otherwise noted.

Subpart A—General Interpretation

§ 1115.1 Purpose.

The purpose of this Part 1115 is to set forth the Consumer Product Safety Commission's (Commission's) interpretation of the reporting requirements imposed on manufacturers (including importers), distributors, and retailers by section 15(b) of the Consumer Product Safety Act, as amended (CPSA) (15

U.S.C. 2064(b)) and to indicate the actions and sanctions which the Commission may require or impose to protect the public from substantial product hazards, as that term is defined in section 15(a) of the CPSA.

§ 1115.2 Scope and finding.

(a) Section 15(a) of the CPSA (15 U.S.C. 2064(a)) defines "substantial product hazard" as either (1) a failure to comply with an applicable consumer product safety rule, which failure creates a substantial risk of injury to the public, or (2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.

(b) Section 15(b) of the CPSA requires every manufacturer (including an importer), distributor, or retailer of a consumer product distributed in commerce who obtains information which reasonably supports the conclusion that the product either fails to comply with an applicable consumer product safety rule or contains a defect which could create a substantial product hazard immediately to inform the Commission, unless the manufacturer (including an importer), distributor, or retailer has actual knowledge that the Commission has been adequately informed. This provision indicates that a broad spectrum of safety-related information should be reported under section 15(b) of the CPSA.

(c) Sections 15(c) and 15(d) of the CPSA (15 U.S.C. 2064(c) and (d)) empower the Commission to order a manufacturer (including an importer), distributor, or retailer of a consumer product distributed in commerce that presents a substantial product hazard to give various forms of notice to the public of the defect or the failure to comply and/or to order the subject firm to elect either to repair, to replace, or

to refund the purchase price of such product. However, information which should be reported under section 15(b) of the CPSA does not automatically indicate the presence of a substantial product hazard since what must be reported are failures to comply with consumer product safety rules and defects that could create a substantial product hazard. (See § 1115.12.)

(d) The provisions of this Part 1115 deal with all consumer products (including imports) subject to regulation under the Consumer Product Safety Act, as amended (15 U.S.C. 2051-2081) (CPSA), and the Refrigerator Safety Act (15 U.S.C. 1211-1214) (RSA). In addition, the Commission has found that risks of injury to the public from consumer products subject to regulation under the Flammable Fabrics Act (15 U.S.C. 1191-1204) (FFA), the Federal Hazardous Substances Act (15 U.S.C. 1261-1274) (FHSA), and the Poison Prevention Packaging Act of 1970 (15 U.S.C. 1471-1476) (PPPA) cannot be eliminated or reduced to a sufficient extent in a timely fashion under those acts. Therefore; pursuant to section 30(d) of the CPSA (15 U.S.C. 2079(d)), manufacturers (including importers), distributors, and retailers of consumer products which are subject to regulation under provisions of the FFA, FHSA, and PPPA must comply with the reporting requirements of section 15(b).

§ 1115.3 Definitions.

In addition to the definitions given in section 3 of the CPSA (15 U.S.C. 2052), the following definitions apply:

(a) "Adequately informed" under section 15(b) of the CPSA means that the Commission staff has received the information requested under §§ 1115.12 and/or 1115.-13 of this part insofar as it is reasonably available and applicable or that the staff has informed the subject firm that the staff is adequately informed.

(b) "Commission meeting" means the joint deliberations of at least a majority of the Commission were such deliberations determine or result in the conduct or disposition of official Commission business. This term is synonymous with "Commission meeting" as defined in the Commission's regulation issued under the Government in the Sunshine Act, 16 CFR Part 1012.

(c) "Noncompliance" means the failure of a consumer product to comply with an applicable consumer product safety rule issued under the CPSA.

(d) A "person" means a corporation, company, association, firm, partnership, society, joint stock company, or individual.

(e) "Staff" means the staff of the Consumer Product Safety Commission unless otherwise stated.

(f) "Subject firm" means any manufacturer (including an importer), distributor, or retailer of a consumer product.

§ 1115.4 Defect.

Section 15(b)(2) of the CPSA requires every manufacturer (including an importer), distributor, and retailer of a consumer product who obtains information which reasonably supports the conclusion that the product contains a defect which could create a substantial product hazard to inform the Commission of such defect. Thus, whether the information available reasonably suggests a defect is the first determination which a subject firm must make in deciding whether it has obtained information which must be reported to the Commission. In determining whether it has obtained information which reasonably supports the conclusion that its consumer product contains a defect, a subject firm may be guided by the criteria the Commission and staff use in determining whether

a defect exists. At a minimum, defect includes the dictionary or commonly accepted meaning of the word. Thus, a defect is a fault, flaw, or irregularity that causes weakness, failure, or inadequacy in form or function. A defect, for example, may be the result of a manufacturing or production error; that is, the consumer product as manufactured is not in the form intended by, or fails to perform in accordance with, its design. In addition, the design of and the materials used in a consumer product may also result in a defect. Thus, a product may contain a defect even if the product is manufactured exactly in accordance with its design and specifications, if the design presents a risk of injury to the public. A design defect may also be present if the risk of injury occurs as a result of the operation or use of the product or the failure of the product to operate as intended. A defect can also occur in a product's contents, construction, finish, packaging, warnings, and/or instructions. With respect to instructions, a consumer product may contain a defect if the instructions for assembly or use could allow the product, otherwise safely designed and manufactured, to present a risk of injury. To assist subject firms in understanding the concept of defect as used in the CPSA, the following examples are offered:

(a) An electric appliance presents a shock hazard because, through a manufacturing error, its casing can be electrically charged by full-line voltage. This product contains a defect as a result of manufacturing or production error.

(b) Shoes labeled and marketed for long-distance running are so designed that they might cause or contribute to the causing of muscle or tendon injury if used for long-distance running. The shoes are defective due to the labeling and marketing.

(c) A kite made of electrically conductive material presents a risk of electrocution if it is long enough to become entangled in power lines and be within reach from the ground. The electrically conductive material contributes both to the beauty of the kite and the hazard it presents. The kite contains a design defect.

(d) A power tool is not accompanied by adequate instructions and safety warnings. Reasonably foreseeable consumer use or misuse, based in part on the lack of adequate instructions and safety warnings, could result in injury. Although there are no reports of injury, the product contains a defect because of the inadequate warnings and instructions.

(e) An exhaust fan for home garages is advertised as activating when carbon monoxide fumes reach a dangerous level but does not exhaust when fumes have reached the dangerous level. Although the cause of the failure to exhaust is not known, the exhaust fan is defective because users rely on the fan to remove the fumes and the fan does not do so.

However, not all products which present a risk of injury are defective. For example, a knife has a sharp blade and is capable of seriously injuring someone. This very sharpness, however, is necessary if the knife is to function adequately. The knife does not contain a defect insofar as the sharpness of its blade is concerned, despite its potential for causing injury, because the risk of injury is outweighed by the usefulness of the product which is made possible by the same aspect which presents the risk of injury. In determining whether the risk of injury associated with a product is the type of risk which will render the product defective, the Commission and staff will consider, as appropriate: The utility of the product in-

volved; the nature of the risk of injury which the product presents; the necessity for the product; the population exposed to the product and its risk of injury; the Commission's own experience and expertise; the case law interpreting Federal and State public health and safety statutes; the case law in the area of products liability; and other factors relevant to the determination. If the information available to a subject firm does not reasonably support the conclusion that a defect exists, the subject firm need not report. However, if the information does reasonably support the conclusion that a defect exists, the subject firm must then consider whether that defect could create a substantial product hazard. (See § 1115.12(f) for factors to be assessed in determining whether a substantial product hazard could exist.) If the subject firm determines that the defect could create a substantial product hazard, the subject firm must report to the Commission. Most defects could present a substantial product hazard if the public is exposed to significant numbers of defective products or if the possible injury is serious or is likely to occur. Since the extent of public exposure and/or the likelihood or seriousness of injury are ordinarily not known at the time a defect first manifests itself, subject firms are urged to report if in doubt as to whether a defect could present a substantial product hazard. On a case-by-case basis the Commission and the staff will determine whether a defect within the meaning of section 15 of the CPSA does, in fact, exist and whether that defect presents a substantial product hazard. Since a consumer product may be defective even if it is designed, manufactured, and marketed exactly as intended by a subject firm, subject firms should report if in doubt as to whether a defect exists. Defect, as discussed in this section and as used by the Commission and staff, pertains only to interpreting and enforcing the Con-

sumer Product Safety Act. The criteria and discussion in this section are not intended to apply to any other area of the law.

§§ 1115.5—1115.9 [Reserved]

§ 1115.10 Persons who must report and where to report.

(a) Every manufacturer (including importer), distributor, or retailer of a consumer product that has been distributed in commerce who obtains information that such consumer product contains a defect which could create a substantial risk of injury to the public shall immediately notify the Product Defect Correction Division, Consumer Product Safety Commission, Washington, D.C. 20207 (telephone: 301-492-6608), or such other persons as may be designated. Manufacturers (including importers), distributors, and retailers of consumer products subject to regulation by the Commission under provisions of the FFA, FHSA, PPPA, as well as consumer products subject to regulation under the CPSA and RSA, must comply with this requirement.

(b) Every manufacturer (including importer), distributor, or retailer of a consumer product that has been distributed in commerce who obtains information that such consumer product fails to comply with an applicable consumer product safety standard or ban issued under the CPSA shall immediately notify the Commission's Product Defect Correction Division or such other persons as may be designated. A subject firm need not report a failure to comply with a standard or regulation issued under the provisions of the RSA, FFA, FHSA, or PPPA unless it can be reasonably concluded that the failure to comply results in a defect which could create a substantial product hazard. (See paragraph (a) of this section.)

(c) A distributor or retailer of a consumer product (who is neither a manufacturer nor an importer of that product) is subject to the reporting requirements of section 15(b) of the

CPSA but may satisfy them by following the procedure detailed in § 1115.13(b).

(d) A manufacturer (including an importer), distributor, or retailer need not inform the Commission under section 15(b) of the CPSA if that person has actual knowledge that the Commission has been adequately informed of the defect or failure to comply. (See section 15(b) of the CPSA.)

§ 1115.11 Imputed knowledge.

(a) In evaluating whether or when a subject firm should have reported, the Commission will deem a subject firm to have obtained reportable information when the information has been received by an official or employee who may reasonably be expected to be capable of appreciating the significance of the information. (See § 1115.14(b)).

(b) In evaluating whether or when a subject firm should have reported, the Commission will deem a subject firm to know what a reasonable person acting in the circumstances in which the firm finds itself would know. Thus, the subject firm shall be deemed to know what it would have known if it had exercised due care to ascertain the truth of complaints or other representations. This includes the knowledge a firm would have if it conducted a reasonably expeditious investigation in order to evaluate the reportability of a death or grievous bodily injury or other information. (See § 1115.14.)

§ 1115.12 Information which should be reported; evaluating substantial product hazard.

(a) *General.* Subject firms should not delay reporting in order to determine to a certainty the existence of a noncompliance or a defect and the substantiality of a possible hazard. The obligation to report arises upon receipt of information from which one could reasonably conclude the existence of a noncompliance or of a defect which could create a substantial

product hazard. Thus an obligation to report may arise when a subject firm receives the first information regarding a potential hazard or noncompliance. (See § 1115.14(c)). A subject firm in its report to the Commission need not admit or may specifically deny that the information it submits reasonably supports the conclusion that its consumer product is noncomplying or contains a defect which could create a substantial product hazard within the meaning of section 15(b) of the CPSA. After receiving the report, the staff will preliminarily determine whether the noncompliance or defect presents a substantial product hazard. This determination can be based on information supplied by a subject firm or from any other source. If the matter is adjudicated, the Commission will ultimately make the decision as to substantial product hazard or will seek to have a court make the decision as to imminent product hazard.

(b) *Failure to comply.* Information indicating that a consumer product fails to comply with an applicable consumer product safety standard or ban issued under the CPSA must be reported.

(c) *Death or grievous bodily injury.* Information indicating that a noncompliance or a defect in a consumer product has caused, may have caused, or contributed to the causing, or could cause or contribute to the causing of a death or grievous bodily injury (e.g., mutilation, amputation/dismemberment, disfigurement, loss of important bodily functions, debilitating internal disorders, severe burns, severe electrical shocks, and injuries likely to require extended hospitalization) must be reported, unless the subject firm has investigated and determined that the information is not reportable.

(d) *Other information indicating a defect or noncompliance.* Even if there are no reports of a potential for or an

actual death or grievous bodily injury, other information may indicate a reportable defect or noncompliance. In evaluating whether or when a subject firm should have reported, the Commission will deem a subject firm to know what a reasonable and prudent manufacturer (including an importer), distributor, or retailer would know. (See § 1115.11.)

(e) *Information which should be studied and evaluated.* The following are examples of information which a subject firm should study and evaluate in order to determine whether it is obligated to report under section 15(b) of the CPSA:

(1) Information about engineering, quality control, or production data suggesting the existence of a noncompliance or of a defect which could create a substantial product hazard.

(2) Information about safety-related production or design change(s) suggesting the existence of a noncompliance or of a defect which could create a substantial product hazard.

(3) Product liability suit(s) suggesting the existence of a noncompliance or of a defect which could create a substantial product hazard.

(4) Information from an independent testing laboratory suggesting the existence of a noncompliance or of a defect which could create a substantial product hazard.

(5) Complaint(s) from a consumer or consumer group indicating the existence of a noncompliance or of a defect which could create a substantial product hazard.

(6) Information received from the Commission or another governmental agency indicating the existence of a noncompliance or of a defect which could create a substantial product hazard.

(7) Information received from other firms, including requests to return a product or for replacement or credit,

indicating the existence of a noncompliance or of a defect which could create a substantial product hazard. This includes both requests made by distributors and retailers to the manufacturer and requests from the manufacturer that products be returned.

(f) *Evaluating substantial risk of injury.* Information which should be or has been reported under section 15(b) of the CPSA does not automatically indicate the presence of a substantial product hazard. On a case-by-case basis the Commission and the staff will determine whether a defect or noncompliance exists and whether it results in a substantial risk of injury to the public. In deciding whether to report, subject firms may be guided by the following criteria the staff and the Commission use in determining whether a substantial product hazard exists:

(1) *Hazard created by defect.* Section 15(a)(2) of the CPSA lists factors to be considered in determining whether a defect creates a substantial risk of injury. These factors are set forth in the disjunctive. Therefore, the existence of any one of the factors could create a substantial product hazard. The Commission and the staff will consider some or all of the following factors, as appropriate, in determining the substantiality of a hazard created by a product defect:

(i) *Pattern of defect.* The Commission and the staff will consider whether the defect arises from the design, composition, contents, construction, finish, packaging, warnings, or instructions of the product or from some other cause and will consider the conditions under which the defect manifests itself.

(ii) *Number of defective products distributed in commerce.* Even one defective product can present a substantial risk of injury and provide a basis for a

substantial product hazard determination under section 15 of the CPSA if the injury which might occur is serious and/or if the injury is likely to occur. However, a few defective products with no potential for causing serious injury and little likelihood of injuring even in a minor way will not ordinarily provide a proper basis for a substantial product hazard determination.

(iii) *Severity of the risk.* A risk is severe if the injury which might occur is serious and/or if the injury is likely to occur. In considering the likelihood of any injury the Commission and the staff will consider the number of injuries reported to have occurred, the intended or reasonably foreseeable use or misuse of the product, and the population group exposed to the product (e.g., children, elderly, handicapped).

(iv) *Other considerations.* The Commission and the staff will consider all other relevant factors.

(2) *Hazard presented by noncompliance.* Section 15(a)(1) of the CPSA states that a substantial product hazard exists when a failure to comply with an applicable consumer product safety rule creates a substantial risk of injury to the public. Therefore, the Commission and staff will consider whether the noncompliance is likely to result in injury when determining whether the noncompliance creates a substantial product hazard. As appropriate, the Commission and staff may consider some or all of the factors set forth in paragraph (f)(1) of this section in reaching the substantial product hazard determination.

§ 1115.13 Content and form of reports: delegations of authority.

(a) *Written reports.* The chief executive officer of the subject firm should sign any written reports to the Commis-

sion under section 15(b) of the CPSA unless this responsibility has been delegated by filing a written delegation of authority with the Commission's Product Defect Correction Division. Delegations of authority filed with the Commission under § 1115.9 of the previous regulations interpreting section 15 of the CPSA will remain in effect until revoked by the chief executive officer of the subject firm. The delegation may be in the following form:

DELEGATION OF AUTHORITY

(Name of company) .....

I ..... hereby certify that I am Chief Executive Officer of the above-named company and that as such I am authorized to sign documents and to certify on behalf of said company the accuracy and completeness of information in such documents.

Pursuant to the power vested in me, I hereby delegate all or, to the extent indicated below, a portion of that authority to the person listed below.

This delegation is effective until revoked in writing. Authority delegated to:

(Name) .....

(Address) .....

(Title) .....

Extent of authority: .....

.....

.....

Signed:

(Name) .....

(Address) .....

(Title) .....

(b) *Distributors and retailers.* A distributor or retailer of a possibly defective or noncomplying consumer product (who is neither a manufacturer nor an importer of that product)

satisfies the initial reporting requirements either by telephoning or writing the Product Defect Correction Division, Consumer Product Safety Commission, Washington, D.C. 20207; by sending a letter describing the defective or noncomplying product to the manufacturer (or importer) of the product and sending a copy of the letter to the Commission's Product Defect Correction Division; or by forwarding to the Commission's Product Defect Correction Division reportable information received from another firm. A distributor or retailer who receives reportable information from a manufacturer (or importer) shall report to the Commission unless the manufacturer (or importer) informs the distributor or retailer that a report has been made to the Commission. A report under this subsection should contain the information detailed in paragraph (c) of this section insofar as it is known to the distributor or retailer. Unless further information is requested by the staff, this action will constitute a sufficient report insofar as the distributor or retailer is concerned.

(c) *Initial report.* Immediately after a subject firm has obtained information which reasonably supports the conclusion that a product fails to comply with an applicable consumer product safety rule or contains a defect which could create a substantial risk of injury to the public, the subject firm should provide the Product Defect Correction Division, Consumer Product Safety Commission, Washington, D.C. 20207 (telephone: 301-492-6608), with an initial report containing the information listed below. This initial report may be made by any means; but if it is not in writing, it should be confirmed in writing within 48 hours of the initial report. (See § 1115.14 for time computations.) The initial report should contain, insofar as is reasonably available and/or applicable:

(1) An identification and description of the product.

(2) The name and address of the manufacturer (or importer) or, if the manufacturer or importer is not known, the names and addresses of all known distributors and retailers of the product.

(3) The nature and extent of the possible defect or the failure to comply with an applicable consumer product safety rule.

(4) The nature and extent of the injury or risk of injury associated with the product.

(5) The name and address of the person informing the Commission.

(6) To the extent such information is then reasonably available, the data specified in § 1115.13(d).

(d) *Full report.* Subject firms which file initial reports are required to file full reports in accordance with this subsection. Retailers and distributors may satisfy their reporting obligations in accordance with § 1115.13(b). At any time after an initial report, the staff may modify the requirements detailed in this section with respect to any subject firm. If the staff preliminarily determines that there is no substantial product hazard, it may inform the firm that its reporting obligation has been fulfilled. However, a subject firm would be required to report if it later became aware of new information indicating a reportable defect or noncompliance, whether the new information related to the same or another consumer product. Unless modified by staff action, the following information, to the extent that it is reasonably available and/or applicable, constitutes a "full report," must be submitted to the staff, and must be supplemented or corrected as new or different information becomes known:

(1) The name, address, and title of the person submitting the "full report" to the Commission.

(2) The name and address of the manufacturer (or importer) of the product and the addresses of the manufacturing plants for that product.

(3) An identification and description of the product(s). Give retail prices, model numbers, serial numbers, and date codes. Describe any identifying marks and their location on the product. Provide a picture or a sample of the product.

(4) A description of the nature of the defect or failure to comply with an applicable consumer product safety rule. If technical drawings, test results, schematics, diagrams, blueprints, and other graphic depictions are available, attach copies.

(5) The nature of the injury or the possible injury associated with the product defect or failure to comply with an applicable consumer product safety rule.

(6) The manner in which and the date when the information about the defect or noncompliance (e.g., complaints, reported injuries, quality control testing) was obtained. If any complaints related to the safety of the product or any allegations or reports of injuries associated with the product have been received, copies of such complaints or reports (or a summary thereof) shall be attached. Give a chronological account of facts or events leading to the report under section 15(b) of the CPSA, beginning with receipt of the first information which ultimately led to the report. Also included may be an analysis of these facts or events.

(7) The total number of products and units involved.

(8) The dates when products and units were manufactured, imported, distributed, and sold at retail.

(9) The number of products and units in each of the following: in the possession of the manufacturer or im-

porter, in the possession of private labelers, in the possession of distributors, in the possession of retailers, and in the possession of consumers.

(10) An explanation of any changes (e.g., designs, adjustments, additional parts, quality control, testing) that have been or will be effected to correct the defect or failure to comply and of the steps that have been or will be taken to prevent similar occurrences in the future together with the timetable for implementing such changes and steps.

(11) Information that has been or will be given to purchasers, including consumers, about the defect or noncompliance with a description of how this information has been or will be communicated. This shall include copies or drafts of any letters, press releases, warning labels, or other written information that has been or will be given to purchasers, including consumers.

(12) The details of and schedule for any contemplated refund, replacement, or repair actions, including plans for disposing of returned products (e.g., repair, destroy, return to foreign manufacturer).

(13) A detailed explanation and description of the marketing and distribution of the product from the manufacturer (including importer) to the consumer (e.g., use of sales representatives, independent contractors, and/or jobbers; installation of the product, if any, and by whom).

(14) Upon request, the names and addresses of all distributors, retailers, and purchasers, including consumers.

(15) Such further information necessary or appropriate to the functions of the Commission as is requested by the staff.

§ 1115.14 Time computations.

(a) *General.* Weekends and holidays are excluded from the computation of the time periods in this part.

(b) *Imputing knowledge.* In evaluating whether or when a firm should have reported, the Commission shall impute to the subject firm knowledge of product safety related information received by an official or employee of a subject firm capable of appreciating the significance of the information. Under ordinary circumstances, 5 days should be the maximum reasonable time for information to reach the Chief Executive Officer or the official or employee responsible for complying with the reporting requirements of section 15(b) of the CPSA. The Commission will impute knowledge possessed by the Chief Executive Officer or by the official or employee responsible for complying with the reporting requirements of section 15(b) of the CPSA simultaneously to the subject firm.

(c) *Time when obligation to report arises.* The obligation to report under section 15(b) of CPSA may arise upon receipt by a subject firm of the first information regarding a noncompliance or a potential hazard presented by a product defect. Information giving rise to a reporting obligation may include, but is not limited to, complaints, injury reports, quality control and engineering data. A subject firm should not await complete or accurate risk estimates before reporting under section 15(b) of CPSA. However, if information is not clearly reportable, a subject firm may spend a reasonable time for investigation and evaluation. (See § 1115.14(d).)

(d) *Time for investigation and evaluation.* A subject firm may conduct a reasonably expeditious investigation in order to evaluate the reportability of a death or grievous bodily injury or other information. This investigation and evaluation should not exceed 10 days unless a firm can demonstrate that a longer period is reasonable. The Commission will deem that at the end of 10 days, a subject firm has received and considered all

information which would have been available to it had a reasonable, expeditious, and diligent investigation been undertaken.

(e) *Time to report.* Immediately, that is, within 24 hours, after a subject firm has obtained information which reasonably supports the conclusion that its consumer product fails to comply with an applicable consumer product safety rule or contains a defect which could create a substantial risk of injury to the public, the firm should report. (See § 1115.13.) If a firm elects to conduct an investigation in order to evaluate the existence of reportable information, the 24-hour period begins when the subject firm has information which reasonably supports the conclusion that its consumer product fails to comply with an applicable consumer product safety rule or contains a defect which could create a substantial product hazard. Thus, a firm could report to the Commission before the conclusion of a reasonably expeditious investigation and evaluation if the reportable information becomes known during the course of the investigation. In lieu of conducting an investigation, the firm may report the information immediately.

§ 1115.15 Confidentiality and disclosure of data.

(a) *General.* The Commission does not routinely make reports available to the public until the staff has made a preliminary hazard determination. Copies of reports will not be available to the public in the Commission's public reading room, and information contained in reports will not ordinarily be disclosed to the public in the absence of a formal request.

(b) *Freedom of Information Act.* Any person who submits information to the Commission who believes that any portion of the information is entitled to exemption from public disclosure under the provisions of the Freedom of Information Act, as amended (15 U.S.C. 552(b)), of the CPSA, as amended, or of another Federal statute must accompany the submission with a written request that the information be considered

exempt from disclosure or indicate that a written request will be submitted within 10 working days of the submission. The request shall (1) identify the portions of the information for which exemption is claimed, which may include the identity of the reporting firm and the fact that it is making a report, and (2) state the facts and reasons which support the claimed exemption. After the staff has made its preliminary hazard determination, and regardless of whether or not the staff preliminarily determines that a product presents a substantial product hazard, the Commission will no longer honor requests for exempt status for the identity of the reporting firm, the identity of the consumer product, and the nature of the reported alleged defect or noncompliance. This information, together with the staff's preliminary hazard determination, will be made available to the public in the Commission's public reading room. Information for which exempt status is claimed (such as alleged trade secrets, confidential commercial or financial information, or information the disclosure of which would constitute an unwarranted invasion of personal privacy) shall not be released to the public except in accordance with the applicable statute or the Commission's Freedom of Information Act regulations (16 CFR 1015).

(c) *Section 6(b) of the CPSA.* The Commission believes that the first two sentences in section 6(b)(1) of the CPSA (15 U.S.C. 2055(b)(1)) apply to affirmative dissemination of information by the Commission (such as press releases or fact sheets distributed to the public) from which the public may ascertain readily the identity of the product's manufacturer and/or private labeler. Manufacturers and private labelers will ordinarily be given 30 days' notice before the Commission makes such affirmative disseminations. However, this 30-day notice will not apply if the Commission finds that a lesser notice period is required in the interest of public health and safety.

VICKI LYNN DRAKE, et al.,

Appellees,

v.

HONEYWELL, INC.,

Appellant,

v.

WAGONER WATER HEATER CO., INC.,

Appellee.

No. 85-5179.

United States Court of Appeals,

Eighth Circuit.

Submitted Dec. 10, 1985.

Decided July 23, 1986.

Rehearing Denied Aug. 28, 1986.

Before LAY, Chief Judge, JOHN R. GIBSON, Circuit Judge, and McMANUS,* District Judge.

The question presented is whether section 23(a) of the Consumer Product Safety Act, 15 U.S.C. § 2072(a) (1982), creates a private cause of action for an injury resulting from noncompliance with the product hazard reporting rules issued by the Consumer Product Safety Commission. We conclude that it does not, and therefore reverse the judgment of the district court.

I.

Vicki Lynn Drake commenced this action to recover damages for personal injuries sustained in the explosion of a liquid propane gas water heater. Drake claims that the accident was caused by a design defect in the water heater control knob designed by Honeywell. She asserts common law products liability theories of relief against Honeywell including negligence, breach of warranty, and strict liability in tort.

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* The HONORABLE EDWARD J. McMANUS, Senior United States District Judge for the Northern District of Iowa, sitting by designation.

These state law claims come to this forum pendent to a federal claim predicated upon a private cause of action under section 23(a) of the Consumer Product Safety Act, 15 U.S.C. § 2072(a) (1982). *See United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). Section 23(a) of the Act vests a private cause of action for damages in any person who is injured by virtue of a knowing violation of a "consumer product safety rule, or any other rule or order" issued by the Consumer Product Safety Commission, and provides attorney fees to the prevailing plaintiff.[1] It is significant that a section 23(a) private cause of action arises from a rule violation only. Section 23(a) does not allow a private action for violations of the statute itself. Section 15(b) of the Act, 15 U.S.C. § 2064(b) (1982), requires a manufacturer, distributor, or retailer who obtains information that reasonably supports the conclusion that its product contains a defect which could create a substantial product hazard to notify the Commission of the product defect.[2] The Commission, at 16 C.F.R.

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[1] Section 23(a) reads in pertinent part:

> Any person who shall sustain injury by reason of any knowing (including willful) violation of a consumer product safety rule, or any other rule or order issued by the Commission may sue any person who knowingly (including willfully) violated any such rule or order in any district court of the United States in the district in which the defendant resides or is found or has an agent, shall recover damages sustained, and may, if the court determines it to be in the interest of justice, recover the costs of suit, including reasonable attorneys' fees * * *.

[2] Section 15(b) reads in pertinent part:

> Every manufacturer of a consumer product distributed in commerce, and every distributor and retailer of such product, who obtains information which reasonably supports the conclusion that such product—
>
> * * * * *
>
> (2) contains a defect which could create a substantial product hazard * * *
>
> shall immediately inform the Commission * * * of such defect, unless such manufacturer, distributor, or retailer has actual knowledge that the Commission has been adequately informed of such defect * * *.

Part 1115 (1985), has promulgated rules which elaborate on the statutory reporting requirement. These rules specify, among other things, who must report to the Commission, *id.* § 1115.10; what information must be reported, *id.* § 1115.12; the form the reports must take, *id.* § 1115.13; and the timetable for reporting, *id.* § 1115.14.

Drake claims that before the explosion which caused her injuries occurred, Honeywell had learned that the water heater control knob contained a defect which could create a substantial product hazard. She asserts that Honeywell should have reported the information to the Commission as prescribed by the rules at 16 C.F.R. Part 1115. Honeywell's failure to comply with the reporting rules, she concludes, constitutes a violation of a rule issued by the Commission and gives rise to a private cause of action under section 23(a). She seeks recovery on the theory that had Honeywell reported the information in accordance with the Commission's rules, the defect would have been cured or the water heater removed from the market and her injury prevented.

Honeywell moved the district court to dismiss the federal claim. It argued that a private cause of action cannot arise from noncompliance with the reporting rules at 16 C.F.R. Part 1115 because these are not the kind of rules that Congress intended to be enforced by the section 23(a) private mechanism. According to Honeywell, the purpose of 16 C.F.R. Part 1115 is merely to set forth the Commission's interpretation of the reporting requirements imposed by Congress under section 15(b) of the Act, to provide guidance to those whose conduct may be governed by the statute. They are interpretive rules, not legislative or substantive rules. They do not establish legally enforceable obligations and therefore cannot be violated. Honeywell thus concludes that Drake's claim, boiled down, is predicated not upon a violation of the rules issued pursuant to

section 15(b), but upon a violation of section 15(b) itself. Section 23(a), however, is plain that only a rule violation is subject to private enforcement. A violation of the statute, Honeywell concedes, can be prosecuted by the Commission and punished with fines, injunction, or imprisonment. It does not, however, give rise to a private cause of action.

The district court denied Honeywell's motion to dismiss. *Drake v. Lochinvar Water Heater, Inc.*, 618 F.Supp. 549 (D. Minn. 1985). The court acknowledged that the word "rule" is not defined in the Act. However, focusing on the plain meaning of "rule," the district court concluded that the product hazard reporting rules issued by the Commission, even if interpretive rules, are plainly "rules" within the meaning of section 23(a). Thus, the court held that a private action can be maintained against Honeywell for its alleged violation of 16 C.F.R. Part 1115. The district court later amended its order to certify the issue for interlocutory review and this appeal followed.

II.

Section 23(a) by its terms permits a private cause of action for the violation of "a consumer product safety rule, or any other rule or order" issued by the Commission. The Act defines "consumer product safety rule," 15 U.S.C. § 2052(a)(2), but does not define the scope of the "other rule" provision. Nonetheless, the reporting rules issued by the Commission, whether legislative or interpretive, are patently within the plain meaning of the word "rule." Therefore, it would appear from the language of section 23(a) that a failure to comply with the reporting rules gives rise to a private cause of action.[3]

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[3] The "plain meaning" construction has been used by several district courts to support a private cause of action. *See, e.g., Wilson v. Robertshaw Controls Co.*, 600 F.Supp. 671, 675 (N.D. Ind. 1985); *Payne v. A.O. Smith Corp.*, 578 F.Supp. 733, 738 (S.D. Ohio 1983);

[1] Our investigation, however, only starts with the statutory language. The question whether a statute permits a private right of action is ultimately one of congressional intent. *Universities Research Association, Inc. v. Coutu,* 450 U.S. 754, 770, 101 S.Ct. 1451, 1461, 67 L.Ed.2d 662 (1981). " '[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, or within the intention of its makers.' " *United Steelworkers of America v. Weber,* 443 U.S. 193, 201, 99 S.Ct. 2721, 2726, 61 L.Ed.2d 480 (1979) (quoting *Church of the Holy Trinity v. United States,* 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1982)). To discover that intention we must not fix on a single word or sentence, but must examine the law as a whole. *Panama Refining Co. v. Ryan,* 293 U.S. 388, 439, 555 S.Ct. 241, 256, 79 L.Ed. 446 (1935) (Cardozo, J., dissenting). While section 23(a) states that a private action may flow from a violation of a rule, it does not similarly provide for private actions based on a violation of the statute itself. Ordinarily, when a federal statute explicitly creates a private cause of action, it does so for violations of its own provisions, not just for violations of rules that may be issued pursuant to those provisions. This approach was taken, for example, in a similarly comprehensive consumer protection statute enacted just four years earlier, the Consumer Credit Protection Act, 15 U.S.C. §§ 1601-93 (1982 & West Supp. 1986). *See* 15 U.S.C. § 1640(a) (1982) (permitting private action against any creditor who fails to comply with any part of the statute). From this ob-

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Young v. Robertshaw Controls Co., 560 F.Supp. 288, 292-93 (N.D. N.Y. 1983); *Butcher v. Robertshaw Controls Co.,* 550 F.Supp. 692, 698-99 (D. Md. 1981). It also was relied upon by the Minnesota Supreme Court in *Swenson v. Emerson Electric Co.,* 374 N.W.2d 690 (Minn. 1985), *cert. denied,* —— U.S. ——, 106 S.Ct. 1998, 90 L.Ed.2d 678 (1986), to reach the identical conclusion.

vious and unambiguous omission, we must conclude that Congress intentionally withheld from private persons the right to seek damages based on an injury resulting from a violation of the statute.

[2] Section 15(b) of the statute specifically requires reporting of substantial product hazards. Violation of section 15(b) cannot be prosecuted by private action. The trouble with applying the plain meaning of "rule" to the Commission's substantial product hazard reporting rules, then, is that such a reading effectively renders privately enforceable the reporting requirement contained in section 15(b) of the statute. This would seem to frustrate the congressional intent, expressed by the omission of section 23(a), to deny a private cause of action to those injured from a violation of the statute itself. Thus, from a view of the Act as a whole, we would conclude that despite the plain meaning of "rule," failure to comply with the Commission's reporting rules does not give rise to a private cause of action.[4]

III.

[3-5] Our conclusion, that Congress did not intend a section 23(a) private action to arise from noncompliance with the Commission's reporting rules, is reinforced when the problem is viewed through the lens of well-settled principles of admin-

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[4] The court in *Butcher v. Robertshaw Controls Co.*, 550 F.Supp. at 692, observed that § 24 of the Act, 15 U.S.C. § 2073 (1982), grants "[a]ny interested person" the right to enforce a consumer product safety rule or § 15 order. Comparing § 24 to § 23(a), the court reasoned that to deny the private action for violation of the reporting rules would render the "any other rule" language of § 23(a) superfluous. We disagree. First, § 24 limits the available remedy to injunctive relief; damages are not available. Second, the "any other rule" provision encompasses rules, in addition to consumer product safety rules, which the Act authorizes the Commission to issue. *See infra*, note 6. Therefore, our conclusion would not strip the "any other rule" provision of purpose.

istrative law. The Constitution, of course, does not explicitly recognize federal administrative rulemaking authority. Rather, the power to make law resides with the Congress, and administrative agencies may make rules enforceable as law only when that power exclusive to the legislature is properly delegated by statute. *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 398, 60 S.Ct. 907, 914, 84 L.Ed. 1263 (1940). Rules enacted by an administrative agency pursuant to statutory delegation, called substantive or legislative rules, must be judicially enforced as if laws enacted by Congress itself. *Batterton v. Francis,* 432 U.S. 416, 425 & n. 9, 97 S.Ct. 2399, 2405 & n. 9, 53 L.Ed.2d 448 (1977); *United States v. Mersky,* 361 U.S. 431, 437-38, 80 S.Ct. 459, 463, 4 L.Ed.2d 423 (1960). Rules not enacted pursuant to an explicit statutory delegation of lawmaking power, called interpretive rules, are issued merely to provide guidance to parties whose conduct may be governed by the underlying statute, and to courts which must construe it. They "carry no more weight on judicial review than their inherent persuasiveness commands." *Batterton v. Marshall,* 648 F.2d 694, 702 (D.C.Cir.1980). They cannot be independently enforced as law. *General Electric Co. v. Gilbert,* 429 U.S. 125, 141, 97 S.Ct. 401, 410, 50 L.Ed.2d 343 (1976); *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944).

[6, 7] As a consequence of this distinction, while an administrative agency delegated legislative power may sue to enforce its legislative rule, just as it may sue to enforce a statute, it cannot ground legal action in a violation of its interpretive rule. Rather, the agency must demonstrate to the court that no mere interpretive rule, but the underlying statute, has been violated. Certainly a court should give great weight to an agency's interpretation, as reflected in its interpretive rule, of the statute it administers, to determine the scope of the stat-

ute and whether it has been violated. *See, e.g., Skidmore v. Swift & Co.*, 323 U.S. at 140, 65 S.Ct. at 164. But clearly, a claim of conduct inconsistent with an interpretive rule is advanced only to show that the statute itself has been violated. An action based on a violation of an interpretive rule does not state a legal claim. Being in nature hortatory, rather than mandatory, interpretive rules never can be violated. *See generally* 2 K. Davis, *Administrative Law Treatise*, §§ 7.8-.11 (2d ed. 1979); B. Schwartz, *Administrative Law*, §§ 4.6-.7 (2d ed. 1982).

The Commission's reporting rules are plainly interpretive rules.[5] First, the Commission has explained that the purpose of the 16 C.F.R. Part 1115 rules is to "set forth the * * * Commission's interpretation of the reporting requirements imposed on manufacturers * * * by section 15(b)." 16 C.F.R. § 1115.1. This description summarizes the position taken upon publication of the final version of the reporting rules, when the Commission flatly stated that it had "promulgate[d] the rule[s] as interpretive." 43 Fed.Reg. at 34990. The Commission continues to hold this view. *See* 49 Fed.Reg. 13820 (1984). The Commission's characterization of its rule, while not dispositive, is entitled to deference. *See Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 n. 15, 100 S.Ct. 883, 890 n. 15, 63

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[5] Among courts which have considered this problem, there is little disagreement on this point. The reporting rules have been deemed interpretive both by courts permitting the private action, *see Wilson v. Robertshaw Controls Co.*, 600 F.Supp. at 675-76; *Young v. Robertshaw Controls Co.*, 560 F.Supp. at 292-93 n. 8; *Butcher v. Robertshaw Controls Co.*, 550 F.2d at 695; *Swenson v. Emerson Electric Co.*, 374 N.W.2d at 698 n. 2, and by courts rejecting it, *see Kahn v. Sears, Roebuck & Co.*, 607 F.Supp. 957, 958 (N.D. Ga. 1985); *Morris v. Coleco Industries*, 587 F.Supp. 8, 10 (E.D. Va. 1984). Only one court reaching this question has been reluctant to conclude that the rules are interpretive. *See Payne v. A.O. Smith Corp.*, 578 F.Supp. at 738.

L.Ed.2d 154 (1980); *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C.Cir. 1984) (en banc), *cert. denied*, —— U.S. ——, 105 S.Ct. 2153, 85 L.Ed.2d 509 (1985). Second, it is evident from the face of the Act that Congress did not delegate to the Commission legislative authority under section 15(b). Unlike legislation authorizing the enforcement activity of some agencies, such as the Federal Trade Commission Act, 15 U.S.C. §§ 41-77 (1982 & West Supp. 1986) (granting FTC the power to "make rules and regulations for the purpose of carrying out the provisions of this [Act]," 15 U.S.C. § 46(g) (West Supp. 1986)), the Act does not contain general enabling language delegating to the Commission the authority to promulgate rules which carry the force of statute. Rather, Congress delegated such power to the Commission only under specific sections of the Act.[6] No such specific delegation is present in section 15(b). Therefore, even if it so chose, the Commission is powerless to issue legislative rules under section 15(b).[7]

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[6] Legislative authority is granted, for example, to issue consumer product safety standards, 15 U.S.C. § 2056(a) (1982); to ban hazardous products, 15 U.S.C. § 2057 (1982); to regulate stockpiling of products to which a consumer product safety rule applies, 15 U.S.C. § 2058(g)(2) (1982); to prescribe testing programs for certain consumer products, 15 U.S.C. § 2063(b) (1982); to prescribe specific kinds of labeling requirements, 15 U.S.C. § 2063(c) (1982); to require certain kinds of recordkeeping by manufacturers, 15 U.S.C. § 2065(b) (1982); and to require submission of performance and technical data, 15 U.S.C. § 2076(e) (1982). Where the Commission issues rules under these provisions and explicitly states that it intends to exercise the authority delegated by Congress, the resulting rules are legislative, and their violation gives rise to a private cause of action under section 23(a).

[7] It is true, as Drake argues, that in issuing the reporting rules, the Commission employed the APA notice and comment provisions required when issuing legislative rules. *See* 5 U.S.C. § 553 (1982). Yet, as the Commission noted, it employed the APA procedures not out of duty, but for administrative convenience. *See* 40 Fed. Reg. 30936 (1974) (The Commission's "solicitation of public com-

Thus, the product hazard reporting rules issued by the Commission at 16 C.F.R. Part 1115 can only be interpretive rules.[8]

Because the reporting rules, as interpretive rules, merely present the Commission's interpretation of the statute, but are not themselves law, Drake's claim that Honeywell violated 16 C.F.R. Part 1115 when it failed to report really amounts to a claim that Honeywell violated section 15(b) of the Act.

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ment is not required by law and should be considered as having no precedential value."). Moreover, the Commission, even if it so intended, obviously cannot assume authority not specifically delegated merely by employing procedures appurtenant to that authority.

[8] Drake argues that the Commission is empowered to issue reporting rules with legislative effect under the authorization contained in section 27(e) of the Act, 15 U.S.C. § 2076(e), entitled "Performance and technical data." Section 27(a) authorizes the Commission to, "by rule require any manufacturer of consumer products to provide to the Commission such performance and technical data related to performance and safety as may be required to carry out the purposes of this chapter * * *." A similar argument could be made with regard to section 16(b) of the Act, 15 U.S.C. § 2065(b), which concerns "recordkeeping," and which provides: "Every * * * manufacturer * * * shall establish and maintain such records, make such reports, and provide such information as the Commission may, by rule, require for the purposes of implementing this chapter, or to determine compliance with rules or orders prescribed under this chapter." This argument derives its force from the fact that, in the "Authority" paragraph of 16 C.F.R. Part 1115, the Commission notes that the issuance comes pursuant to a multitude of sections of the Act, including sections 27 and 16, both of which contain legislative rulemaking grants. We have some question whether the reporting rules are of the type Congress intended the Commission to issue pursuant to the delegations of sections 27(e) and 16(b). Nonetheless, it is a question we need not resolve. We believe it clear from the text of 16 C.F.R. Part 1115, viewed as a whole, and from the numerous references made therein to section 15(b) of the Act, *see, e.g.*, § 1115.1, that the Commission in fact issued the reporting rules under section 15(b), which contains no legislative rulemaking grant. Whether the Commission could have issued reporting rules under sections 27(e) or 16(b) is not before us.

Drake's response, that noncompliance with the Commission's reporting rules is unlawful if the rules reasonably construe the Act, is correct but beside the point. It well may be that a court would deem the Commission's reporting rules a reasonable interpretation of section 15(b),[9] and thus conclude that the failure to comply with them constitutes a violation of the Act. The charge before us, however, is not that Honeywell's alleged failure to report violates the Act, but that it violates a rule. It is precisely because the Commission's reporting rules, as interpretive rules, are derivative rather than independent of the section 15(b) reporting requirement, that they cannot be violated, but can only signal a violation of section 15(b) itself. Congress made clear, however, that no private action may flow from a violation of the Act. Therefore, a section 23(a) private cause of action cannot arise from an injury resulting from noncompliance with the product hazard reporting rules issued by the Commission.

IV.

A study of the legislative history of section 23(a) does not reveal any congressional intent to permit private enforcement of the Commission's reporting rules. The original House version of section 23(a) limited the private right to suits based on death, injury, or illness resulting from the failure of a consumer product to comply with a consumer product safety rule, or "failure to comply with an order under section 15(c) or section 15(d)." H.R. 15003, 92d Cong., 2d Sess. § 23(a)(2), 118 *Cong.Rec.* 31409 (1972). Sections 15(c) and (d) of the Act authorize the Commission, after providing APA notice and

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[9] *See Swenson v. Emerson Electric Co.*, 374 N.W.2d at 703-05 (concluding that the Commission's reporting rules constitute "a reasonable interpretation of [the Act] in light of the language of the disclosure provision and the structure and purposes of [the Act].").

hearing, *see* 5 U.S.C. § 554 (1982 & West Supp. 1986), and determining that a substantial product hazard exists, to require those responsible for the hazard to notify the public and to repair or replace the hazardous consumer product, or refund the purchase price. 15 U.S.C. §§ 2064(c), (d). No mention is made in the original House version of section 23(a) of private actions based on noncompliance with Commission rules issued under section 15(b). The report of the House Committee on Interstate and Foreign Commerce accompanying the bill similarly refers only to orders under sections 15(c) and (d) in discussing private enforcement of consumer product safety rules and Commission action taken under section 15.[10]

The conspicuous absence of reference to rules issued under section 15(b) in the original bill and the accompanying discussion of private actions alone demonstrates that the House, initially at least, did not contemplate a private action arising from a violation of reporting rules issued by the Commission. It becomes clear that the omission was intended when we consider the bill in its greater administrative law context. Like consumer product safety rules, orders under section 15(c) and

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[10] The report explains:

> Section 23 provides a private remedy for damages to persons injured by reason of noncompliance with certain provisions of the bill * * *. [I]f a person dies or sustains personal injury or illness by reason of a failure to comply with an order under section 15(c) or section 15(d) (relating to notification respecting, and repair, etc., of products presenting substantial product hazards), then he * * * may sue any person who failed to comply with such order under section 15, and may recover any damages sustained as a result of such failure to comply.
>
> The Committee anticipates, in cases in which it is established that death, personal injury or illness occurred by reason of noncompliance with the consumer product safety rule or section 15 order, that the courts will in general apply State law as to questions of which types of damages may be recovered * * *.

H.R.Rep. No. 1153, 92d Cong., 2d Sess. 47-48 (1972).

(d) were expressly authorized in the bill. They therefore were given legislative effect; the Commission was empowered to issue them and to prosecute their violation. The bill, however, did not similarly grant the Commission rulemaking power, and the associated enforcement power, under section 15(b). It is unlikely that the House meant to give private persons greater enforcement power than the Commission itself. *Cf. J.I. Case Co. v. Borak*, 377 U.S. 426, 432, 84 S.Ct. 1555, 1560, 12 L.Ed.2d 423 (1964) (purpose of creating private action is to supplement agency enforcement).

The Senate version of section 23(a) appears broader, allowing a private cause of action for violation of a "consumer product safety standard, regulation, or order." S. 3419, 92d Cong., 2d Sess. § 316(d)(2), 118 *Cong.Rec.* 21911 (1972). Significantly, however, the list in the Senate bill of "prohibited acts" subject to Commission enforcement did not include violations of the reporting requirements of section 313, the predecessor to section 15 of the Act, but only covered any "fail[ure] or refus[al] to comply with an *order* of the Commission pursuant to section 313." S. 3419, 92d Cong., 2d Sess. § 315(2) (1972), 118 *Cong.Rec.* 21910-11 (1972) (emphasis added). Again, there is no reference to enforcement, either by the Commission or private persons, of reporting rules issued by the Commission.

The enacted version of section 23(a), fashioned by the Conference Committee, and containing the "any other rule" language, appears broader still. However, significantly lacking from the congressional reports and debates is any discussion of the new language. Certainly there is no intent expressed to extend the scope of the private right of action beyond that established in the House bill and Senate revision. Indeed, the legislative history is void of any suggestion that Congress in-

tended to provide a private remedy for noncompliance with Commission rules issued pursuant to the section 15(b) reporting requirement. The legislative history of section 23(a) at best presents conflicting intentions. We cannot on this basis conclude that Congress intended a private cause of action for an injury resulting from noncompliance with the product hazard reporting rules issued by the Commission.[11]

V.

The practical consequences of advancing a private cause of action based on the Commission's reporting rules confirms our view that Congress did not intend to create such a right. Claims based on personal injury caused by defective products are readily pursued in most states under a theory of strict liability in tort. To recover in strict liability, the plaintiff need show only that the defendant's product contained an unreasonably dangerous defect which caused plaintiff's injury. *See Restatement (Second) of Torts* § 402(a) (1965). The plaintiff need not prove the defendant knew the product was defective, and proof of causation is relatively direct. On the other hand, were we to approve a section 23(a) action brought for violation of the reporting rules issued by the Commission, a much greater showing would be demanded. First, the plaintiff would have to show that the defendant "knowingly" violated the reporting rules. Second, the plaintiff would have to show that

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[11] *See* Note, *Private Causes of Action Under the Reporting Rules of the Consumer Product Safety Act*, 70 *Minn.L.Rev.* 954, 973-74 n. 104 (1986) (thoroughly reviewing legislative history of section 23(a) and concluding that while the shift toward broader terms might indicate an intent to expand the scope of the section 23(a) private action, "the lack of explanation accompanying the new language makes it hazardous to ascribe any particular intention to the emendations of the bill."). The Note further documents that most of the early commentators on the Act assumed that private actions were limited to consumer product safety rules, and orders under § 15(c) and (d). *Id.* at 975 n. 106.

but for the violation, the injury would have been prevented. In essence, the plaintiff would have to prove that had the defendant reported in accordance with 16 C.F.R. Part 1115, the Commission pursuant to sections 15(c) and (d) would have held a hearing, determined that the product in fact contained a defect which presented a substantial product hazard, and ordered a remedy that would have prevented the plaintiff's injury. The causation problem not only burdens the plaintiff, it also strains the judicial factfinding process. It requires speculation as to whether and how the Commission would have responded to the defendant's report, and whether the Commission's response would have succeeded in preventing the plaintiff's injury.[12] We doubt that Congress intended to set such a tortuous process in motion.

VI.

We do not intend by our holding today to minimize either the important goals sought by the Act or the vital role played by the statutory reporting requirements in achieving them.

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[12] As the Minnesota commentator observes, the speculation problem is exacerbated because

> the standard according to which a seller must report information to the Commission differs from the standard according to which the Commission may issue a § 15(c) or § 15(d) order. A seller must report all information which "reasonably supports the conclusion" that a product is hazardous, whereas the Commission cannot issue an order under § 15(c) or § 15(d) until it has determined after a formal hearing that the product "presents a substantial product hazard." *See* [the Act] §15(c)-(d), 15 U.S.C. § 2064(c)-(d) (1982). Thus, the judge or jury would have to weigh *both* standards and consider the difference between them.

Note, *supra*, note 12 at 977 n. 114 (emphasis in original). On the other hand, when a private action is brought based upon the violation of a consumer product safety rule or Commission order, the judicial factfinder need determine only whether there was a violation which caused the plaintiff's injury. This analysis, at least as respects the causation inquiry, is akin to that emp'oyed in cases brought under a strict liability in tort theory.

Compliance by manufacturers, distributors, and retailers with section 15(b) obviously is critical to the fulfillment of the congressional purpose, to "protect the public against unreasonable risks of injuries associated with consumer products." 15 U.S.C. § 2051(b)(1) (1982). From 1978 to 1984, the overwhelming majority of the nearly 800 section 15(d) recalls, involving some 140 million potentially hazardous product units, was undertaken based upon information furnished under section 15(b). Statler, *Reporting Guidelines Under Section 15 of the Consumer Product Safety Act*, 7 *J.Prod.Liab.* 89, 92-93 (1984). The Commission's limited investigatory and enforcement resources underscore the necessity of voluntary compliance. Moreover, in a recent policy statement, the Commission documents its belief that "there is both a substantial amount of underreporting of the most serious hazards as well as undue delay in filing reports." 49 Fed.Reg. 13820, 13821 (1984). The Commission explains that "[w]hatever the reasons for not reporting, the result is that the safety of the American public can be jeopardized to the extent that large numbers of persons using or possessing the same product remain unaware of the potential risk and are unable to benefit from corrective action that would have been sought by the Commission." *Id.* at 13822.

Whether the purpose sought by the Congress, to prevent consumer product injuries, would be better achieved by arming injured consumers with the authority to enforce reporting requirements, however, is a judgment we must leave to Congress.[13] The federal courts cannot "engraft a remedy on a

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[13] Congress could grant such authority if it so wished either by amending section 23(a), to extend the private right of action for violations of the statute itself, or by amending section 15(b), to grant the Commission the legislative authority to enact enforceable reporting rules. Without additional adjustment, however, the knowledge and causation elements will remain problematic. Still, Congress could well decide that the advantages of a federal forum and recovery of attorney fees outweigh these difficulties.

statute, no matter how salutory, that Congress did not intend to provide." *California v. Sierra Club,* 451 U.S. 287, 297, 101 S.Ct. 1775, 1781, 68 L.Ed.2d 101 (1981). We believe that neither the structure of the Act, its relationship to well-settled principles of administrative law, its legislative history, nor its practical consequences, demonstrates that Congress intended a private cause of action to arise based on an injury resulting from noncompliance with the product hazard reporting rules issued by the Commission. Therefore, the judgment of the district court is reversed and it is directed to dismiss Drake's claim against Honeywell based on violation of 16 C.F.R. Part 1115.

McMANUS, Senior District Judge, concurring in the result.

The Commission issued Part 1115 as interpretive rules and it is clear from reading Part 1115 that the rules are, in fact, interpretive. Therefore, we need not decide whether Congress gave the Commission the power to make legislative product hazard reporting rules.